

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI,	.	
	.	
Plaintiff,	.	
	.	CA No. 10-1469 (JDB)
v.	.	
	.	
BARACK H. OBAMA, et al.,	.	Washington, D.C.
	.	Monday, November 8, 2010
Defendants.	.	2:00 p.m.
	.	
.....	.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	JAMEEL JAFFER, ESQ. American Civil Liberties Union 125 Broad Street 17th Floor New York, NY 10004 212-519-7814
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For the Defendants:	DOUGLAS LETTER, ESQ. U.S. Department of Justice Civil Division 950 Pennsylvania Avenue, NW Room 7513 Washington, D.C. 20530 202-514-36902
Court Reporter:	BRYAN A. WAYNE, RPR, CRR Official Court Reporter U.S. Courthouse, Room 6714 333 Constitution Avenue, NW Washington, D.C. 20001 202-354-3186

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Your Honor, we have civil action
3 10-1469, Nasser Al-Aulaqi versus Barack Obama et al. I would
4 ask counsel to please approach the lectern and identify
5 yourself, starting with the plaintiffs.

6 MR. JAFFER: Good afternoon, Your Honor. I'm Jameel
7 Jaffer representing the plaintiffs. Could I introduce my
8 co-counsel, or would you like them to approach individually?

9 THE COURT: Why don't you do it.

10 MR. JAFFER: I'm here with Pardiss Kebriaei and Maria
11 LaHood from the Center for Constitutional Rights, Ben Wizner
12 from my own office, and Art Spitzer from the ACLU of the
13 National Capital Area.

14 THE COURT: Thank you, Mr. Jaffer.

15 MR. LETTER: May it please the Court, Douglas Letter
16 from the United States Department of Justice. With me today,
17 all from the civil division, we have Mr. Vincent Garvey, Deputy
18 Assistant Attorney General Ian Gershengorn, Peter Leary, Tony
19 Coppelino, and Assistant Attorney General Tony West.

20 THE COURT: And good afternoon to all of you. All
21 right. We're here on two motions, a motion to dismiss by the
22 defendants and a motion for preliminary injunction by the
23 plaintiff.

24 Let me just give a little bit of background. The
25 plaintiff, Anwar Al-Aulaqi, his father has brought this suit

1 challenging his son's alleged designation for targeting or
2 extrajudicial killing by the United States. There are four
3 claims: That the target killing of U.S. citizens -- which Anwar
4 Al-Aulaqi is -- outside of armed conflict and without meeting
5 certain criteria involving imminent threats and the absence of
6 any other reasonable means to neutralize those threats violates
7 the son's Fourth Amendment right to be free from unreasonable
8 seizures, his Fifth Amendment right not to be deprived of life
9 without due process, and violates the alien tort statute,
10 basically because it violates customary international law.

11 Plaintiff also claims that the failure of the United States
12 to disclose the criteria by which the United States designates a
13 U.S. citizen abroad for targeted killing violates Anwar
14 Al-Aulaqi's Fifth Amendment due process notice rights.

15 We have a request for a preliminary injunction by the
16 plaintiff, which would include declaratory and injunctive
17 relief, to prevent the targeted killing of U.S. citizens,
18 including Anwar Al-Aulaqi. There actually is a claim to prevent
19 all targeted killings as well, except pursuant to specific
20 limited criteria requiring an imminent threat to life and no
21 means to prevent that threat short of lethal force.

22 There are several issues that the defendants have raised.
23 They are threshold issues, essentially that the plaintiff lacks
24 standing, either next friend or third party standing, that the
25 case raises nonjusticiable political questions, and that the

1 case can't proceed in light of the government's invocation of
2 the state secrets privilege, through both public and classified
3 declarations of director of national intelligence Clapper,
4 Secretary of Defense Gates and director of the CIA, Panetta.
5 And therefore, the defendants assert that the merits of
6 plaintiff's claims should not be reached.

7 The reason I've gone through this backdrop is to say that
8 counsel can address the issues as they wish, in the order that
9 they wish, focusing on what they choose to focus on.

10 You should assume I'm very familiar with your filings and
11 with the issues. And each side has an hour to address the
12 issues, although I'm not keeping a clock on myself, and
13 therefore probably not on you either. I do expect that most of
14 the hearing will focus on the threshold issues, and therefore I
15 will say this. If I decide to deny the government's motion to
16 dismiss, I do expect or at least believe that I might have a
17 further hearing on the merits of the claims.

18 So I don't want the plaintiffs especially to feel that they
19 have to take all their time on the merits issues. If we wind up
20 in a situation where the government's motion to dismiss has been
21 denied, I may well schedule, quickly, another focused hearing to
22 address the, what I'll call the merits issues.

23 I've decided that I'm going to hear first from the
24 government, then from the plaintiff, and then I will give both
25 the government and the plaintiff a chance to offer some rebuttal

1 or reply. With that, Mr. Letter.

2 MR. LETTER: Thank you, Your Honor. What I'd like to
3 do, with Your Honor's permission, is to reserve 20 minutes of
4 time for rebuttal, but obviously my main desire is to answer
5 your questions.

6 Your Honor has already summarized the background facts and
7 the issues, but I wanted to do a couple of things right up
8 front. First, to make clear that in this action the
9 United States does not confirm or deny any of the claims in the
10 plaintiff's complaint or their papers, particularly about
11 whether there is an alleged kill list and how it's prepared and
12 maintained and who might or might not be on it.

13 THE COURT: To what extent then do I have to assume
14 the truth of the allegations in the plaintiff's papers?

15 MR. LETTER: Well, for purposes of the motion to
16 dismiss, the allegations I think would be taken as true except,
17 as we point out in our papers, there are many of the allegations
18 that you should not accept, such as the key one that goes to the
19 next friend standing argument, where they have said that
20 Al-Aulaqi, the son, cannot communicate, and as we pointed out,
21 there are very serious questions about whether that's true and
22 therefore whether the plaintiff has met his burden.

23 THE COURT: So which allegations do I, under the law,
24 have to accept and which don't I?

25 MR. LETTER: All I'm saying, Your Honor, is as far as

1 the allegations that there is a kill list, et cetera, we're not
2 confirming or denying. So for your purposes, I think you accept
3 that this is what they have alleged. And I think Your Honor is
4 obviously very familiar and comfortable with doing this, such as
5 in the Abu-Ali case. You went through what the plaintiffs had
6 alleged there, recognizing obviously that these are things that
7 would remain to be proven if the case ever moved forward.

8 THE COURT: Didn't necessarily end up at a point where
9 you would like me to end up in this case. In that case I
10 ordered jurisdictional estoppel.

11 MR. LETTER: That's exactly correct, Your Honor. And
12 I'll be happy to explain why that case is quite different from
13 this one. The other thing I just wanted to point out up front
14 is that this is truly an unprecedented and extraordinary suit.
15 You're being asked to issue an injunction against the President
16 of the United States and his top military and intelligence
17 officers, concerning military and intelligence operations
18 abroad.

19 At bottom, the suit is fundamentally inconsistent with the
20 constitutional structure, by trying to put this court in a
21 position of either looking over the shoulder or standing next to
22 the President as he is attempting to make determinations of a
23 military, national security, intelligence nature, overseas.

24 What's even more unusual is this is done in the context
25 where the President is acting pursuant to congressional

1 authorization. So we have a situation where both political
2 branches are united on this.

3 THE COURT: You're right, there's no doubt that it's
4 an extraordinary and unique case. It's unique from the other
5 perspective, too. Or I'll ask you if it's unique. Is there any
6 case in which a court has refused on political question doctrine
7 grounds to hear a U.S. citizen's claim that his personal
8 constitutional rights to life or liberty have been violated as a
9 result of U.S. government action taken abroad? Is there any
10 such case?

11 MR. LETTER: Your Honor, I'm not aware of any case
12 that is like this --

13 THE COURT: Any case in which state secrets has been
14 invoked to deny judicial scrutiny of such a claim?

15 MR. LETTER: No cases that I know of directly on
16 point. There are cases, however, where constitutional claims
17 have been made. And in those circumstances -- very serious
18 constitutional claims, and yet courts have found matters not
19 justiciable and dismissed, or under state secrets found that the
20 case cannot proceed.

21 THE COURT: And there's some that go the other way
22 too.

23 MR. LETTER: There are. However, I don't think any of
24 them are in any way like this. I'm not aware of a single
25 instance where somebody sitting in your position has issued an

1 injunction against the President of the United States with
2 regard to military or intelligence actions abroad. And the
3 plaintiff has not cited a single one. This truly -- they are
4 asking you to go way, way out on a limb here. This would be
5 something unprecedented in the annals of our judicial history.

6 THE COURT: In addition to it being unprecedented,
7 what are the legal reasons that I shouldn't?

8 MR. LETTER: Well, I thought I would just sit down
9 then.

10 (Laughter)

11 In addition, the other thing I wanted to point out is this
12 is being done in a circumstance when the son is somebody who is
13 a leader of an organization. The son has been formally
14 designated as a specially designated terrorist. The
15 organization, the AQAP, the al-Qaeda in the Arabian Peninsula,
16 is a terrorist organization. The United States government has
17 indicated it's linked to al-Qaeda, it's an associated force or
18 cobelligerent with al-Qaeda. And if an injunction is issued
19 here, what it does is it provides a leader of the organization
20 with some sort of ability to continue operational planning for
21 an organization that, as we know, very recently is trying to
22 carry out terrorist acts to kill Americans.

23 So that's the context in which we are talking here, is
24 seeking an injunction against the President, protecting both
25 national security and the security of U.S. nationals.

1 Now, despite all of that that makes this case sound
2 extremely important, what we offer you right up front is what we
3 think is a very narrow and easy and not controversial way to
4 dismiss this case. And by the way, I should have said up front,
5 as you know, we're moving for you to dismiss. If you deny that,
6 we nevertheless think you should deny the preliminary
7 injunction, but I heard what you had said before.

8 So let's get right to this next friend standing argument.
9 The plaintiff is saying that he can bring this suit on behalf of
10 his competent, adult son. There is again yet another way that
11 this case is so bizarre. There is no precedent to suggest that
12 that would be appropriate. We have cases, and indeed we have
13 statutes and rules that provide for next friend status when we
14 have somebody in detention or an adult who is incompetent or a
15 minor.

16 THE COURT: But in the leading Supreme Court case -- I
17 know you're focusing on habeas situations and habeas statutes,
18 but in the leading Supreme Court case, the Court declined to
19 reach the issue of whether next friend could extend beyond those
20 situations.

21 MR. LETTER: Yes, Your Honor, Whitmore left that open.
22 But once again, this fits in with my point about this is
23 something that they're asking you to do that has no precedent,
24 not even close to the precedent that this has. But also -- and
25 remember also that all of this is an exception to the normal

1 Article III rules; overwhelmingly cases get litigated in the
2 United States where there's a case or controversy, and part of
3 that is the individual who is injured is the one who sues.

4 THE COURT: I'm interested in all of this, but I'm
5 interested in this question right now. Part of your state
6 secrets argument relates to there being a necessity to look into
7 facts, even relating to standing, that would be sensitive and
8 shouldn't be looked into by the judiciary. Does that mean that
9 state secrets prevents me from deciding the standing issues, or
10 does it only prevent me, I think the way you cast it, from
11 deciding the standing issues in favor of the plaintiff?

12 MR. LETTER: I love that answer, yes.

13 (Laughter)

14 THE COURT: But isn't that your position?

15 MR. LETTER: State secrets means they can't win.
16 Your Honor, obviously the first point I do need to make is I
17 want to be absolutely clear on this, as we were in our briefs.
18 We do not think, we urge you not to reach state secrets --

19 THE COURT: I understand that, and I think that's a
20 sound position for you to take.

21 MR. LETTER: Thank you very much, Your Honor. But
22 since you have asked about it, yes, we have said that the
23 plaintiff here, certain things that the plaintiff would have to
24 show, and that in order to demonstrate standing the plaintiff
25 would have to show that there is this asserted kill list, and

1 they'd have to show how it's maintained, but most importantly,
2 at some point the plaintiff would have to show that his son is
3 on that list. After all, because if his son is not on the list,
4 there's clearly no injury.

5 And even then it's highly questionable that there's any
6 injury just from being on the list, but that would be at an
7 absolute minimum. I repeat, we will not confirm or deny --

8 THE COURT: But it's almost a situation as if you hold
9 all the cards, and you'll reveal what you want to reveal for me
10 to be able to decide standing. But if they want to win on
11 standing, then they have to get into things that shouldn't be
12 revealed. For instance, what's the answer to this question? If
13 I were to agree with you, as you assert, that Anwar Al-Aulaqi
14 can emerge from his hiding in Yemen to seek judicial relief and
15 he will not be killed, doesn't even getting into that and my
16 accepting that and reaching that conclusion imply some judgment
17 with respect to the criteria that are being followed by the U.S.
18 government in making any targeted killing decisions, and how the
19 U.S. government is carrying out those decisions, and what it's
20 going to do in what situation?

21 Aren't you bringing me, by saying that and asking me to
22 accept it, aren't you bringing me into just the kinds of things
23 that you don't think the judiciary should get into? Can I make
24 that kind of determination? Can I accept what you say with
25 respect to that particular aspect of any alleged targeted

1 killing approach, without encroaching on state secrets?

2 MR. LETTER: I think the answers were no, yes, yes and
3 no.

4 THE COURT: I think you missed one in there. Now
5 you've thrown me off.

6 MR. LETTER: Your Honor, it's clear -- remember that
7 the state secrets privilege removes evidence from the case.
8 It's not that the --

9 THE COURT: It depends. You're not asserting state
10 secrets under Totten. So yes, under Reynolds, it removes
11 evidence.

12 MR. LETTER: Right, exactly. And Your Honor, I'll
13 point out, I know you're familiar with it, but I'll point it out
14 anyway, the D.C. Circuit in the Molerio case where the Court
15 asserted state secrets and the D.C. Circuit --

16 THE COURT: The Court didn't assert it, but go ahead.

17 MR. LETTER: I'm sorry. The government asserted state
18 secrets privilege, the D.C. Circuit accepted that, and then
19 actually peeked at the material and said, in any event, the
20 government wins on the merits. But that's very much not the
21 norm.

22 So when the government properly asserts the privilege, and
23 we think there's no question here that it has, it removes that
24 material from the case. So what we have said -- and by the way,
25 for example, a situation where this resulted properly in a

1 dismissal is the ACLU case in the Sixth Circuit involving the
2 terrorist surveillance program, the government asserted state
3 secrets privilege, said that that meant that the plaintiffs
4 would not be able to show that they had ever been subject to the
5 surveillance policy that they claim. If they couldn't make that
6 showing, they would never be able to assert standing.

7 And so here too, if plaintiffs say well, we could just
8 stick that in the complaint -- but the precedent is clear. At
9 some point you have to prove that. You have to prove that
10 Al-Aulaqi is on some sort of list for lethal targeting. If
11 that's something that the government asserts state secrets
12 privilege over, it takes that out of the case, it is impossible
13 for the plaintiff to ever demonstrate standing under those
14 circumstances.

15 So it's not -- we're not asking you to peek at the
16 classified material in order to rule for us on any of the
17 grounds.

18 THE COURT: No, no. I hadn't assumed that you had.

19 MR. LETTER: But for that very narrow state secrets
20 argument, all we're saying is they will not be able to prove
21 standing. And with it, also, as we point out, there are a host
22 of reasons, which I won't go into here, why the case cannot be
23 litigated.

24 But with Your Honor's permission, shifting back to the
25 non-state secrets claim, on next friend, unless you've heard

1 enough on that, I was going to continue.

2 THE COURT: I'd move on quickly to third party, but if
3 you have something more to say on next friend, you certainly can
4 say it. The only question I would have is what if Anwar
5 Al-Aulaqi did somehow, through an article in *Inspire* or in some
6 other means, say, look, I'm in hiding, I'm scared for my life, I
7 can't come out of hiding, and I authorize my father to bring
8 this suit. Is there next friend standing then?

9 MR. LETTER: No, Your Honor, because, as we've pointed
10 out, there is an alternative, which is -- there are two
11 questions. One, it's not just that he would be in hiding.
12 Remember, it's that he is unable to bring the suit himself. In
13 today's world there are all sorts of ways of communicating.
14 There's no -- Mr. Al-Aulaqi would not have to be in court
15 himself. If he is able, for example, to communicate with the
16 world through *Inspire* magazine, then he should be able to
17 communicate -- and through videotapes, he should be able to
18 communicate with attorneys, and therefore he is able to pursue
19 an action. And the burden is on the plaintiff --

20 THE COURT: Can he pursue that action from Yemen in
21 hiding in his own name?

22 MR. LETTER: Certainly, Your Honor. In a civil case
23 there's no requirement that the plaintiff be present in the
24 United States. Obviously, if there were going to be discovery
25 or something like that, that would raise issues, but otherwise,

1 of course, Your Honor.

2 And in addition, though, the question would still be, as
3 we've pointed out, and Your Honor clearly understands, he has
4 the key to his own safety. He can present himself in an
5 appropriate way to authorities, and then we have made absolutely
6 clear, there should be no question about this at all, that if he
7 does present himself, he is under no danger of the United States
8 government using lethal force. He would be protected under any
9 applicable laws.

10 And so not just does that undermine the ability of the
11 plaintiff to bring this next friend standing case, but it should
12 eliminate any possible argument about irreparable injury. He
13 can make this irreparable by presenting himself appropriately.

14 THE COURT: What about third party standing, which
15 actually has some slightly different requirements, and indeed in
16 one sense the hindrance requirement may be a little lesser
17 requirement than is true for next friend.

18 MR. LETTER: You're right, Your Honor. The courts
19 have stated slightly different tests. One is the inability and
20 the other is hindrance. On that, first of all, Your Honor, I'd
21 like to point out, it's certainly not appropriate to use third
22 party standing as a way to get around the limitations and
23 restrictions on next friend standing. And that really --

24 THE COURT: So what should I do, say you can't do it
25 because you don't have next friend standing?

1 MR. LETTER: What I'm thinking is if he doesn't have
2 next friend standing, it's not just a question of saying oh,
3 great, we could just slide over into third party.

4 THE COURT: Well, there are certain requirements, but
5 if he met those requirements, then why not?

6 MR. LETTER: Yes. That is correct, Your Honor. But
7 he does not meet those requirements. The very first requirement
8 is, for third party standing, not surprisingly, because this is
9 not some free-for-all way to avoid Article III, he has to have
10 standing in his own right.

11 THE COURT: Standing in his own right meaning what?

12 MR. LETTER: He must have standing to bring an action
13 against these defendants.

14 THE COURT: To some claim. So if he has standing on
15 some claim, then he can bring other claims on behalf of a third
16 party.

17 MR. LETTER: No, Your Honor. There has to be some
18 sort of relationship.

19 THE COURT: Let's assume there's some sort of
20 relationship. They involve the same core events.

21 MR. LETTER: Right. And there would have to be a
22 showing that the other party is, the first party -- which is the
23 third party here? -- the first party is hindered, Al-Aulaqi is
24 the first party. But in addition, and this is a very key thing,
25 and the D.C. Circuit set this out in the Haitian Refugee case,

1 for there to be third party standing, for this to work, you have
2 to show that the government has somehow directed its action
3 against the relationship.

4 THE COURT: I don't think that's right. That's what
5 Haitian Refugee said, but then there's the Supreme Court line
6 under Powers that doesn't use that. And it seems to me that
7 even the D.C. Circuit has said that there are sort of these two
8 different ways. That's the way the D.C. Circuit seems to have
9 reconciled those different strains of third party standing,
10 which is to a certain extent a mess, but the D.C. Circuit has
11 reconciled it by saying there are these two different
12 approaches.

13 So I don't think you necessarily -- there are lots of cases
14 in which the Supreme Court has allowed third party standing that
15 don't meet the Haitian Refugee test.

16 MR. LETTER: That did not discuss that. That is
17 right, Your Honor. However, they still don't change the nature
18 of the relationship. And so if we look at some of the cases
19 where there's been third party standing allowed, it's for
20 instance when there's a doctor-patient situation and the
21 government has acted in a way that directly affects that
22 relationship.

23 Now, here the government hasn't acted about this
24 father-adult son relationship. Obviously, again, I'm not
25 confirming or denying, but if the government has in some way

1 placed Al-Aulaqi on a target list for lethal force, that is
2 clearly in no way related --

3 THE COURT: That's an incidental effect.

4 MR. LETTER: Precisely.

5 THE COURT: Stay on injury in fact for a moment.

6 Well, let me ask this. So as I understand your position, if
7 Anwar Al-Aulaqi emerged from hiding, this case would become
8 moot, wouldn't it?

9 MR. LETTER: Yes, because as I say, there would be no
10 threat of lethal force.

11 THE COURT: He'd be in the U.S. custody, and according
12 to what you've represented, there would be no threat of
13 extrajudicial killing.

14 MR. LETTER: That's right.

15 THE COURT: So in that situation, Anwar Al-Aulaqi, he
16 couldn't sue to vindicate his own rights, because there would be
17 no threat and it would be moot.

18 MR. LETTER: Could he sue at that point? Obviously,
19 it would be much -- this case is much easier for the government
20 than that would be. He would still have the same problem of
21 demonstrating standing. He'd still have, I think, most of the
22 arguments --

23 THE COURT: I think he'd run up against mootness,
24 wouldn't he? Isn't that what you would be arguing, because
25 there's no case or controversy, there's no intent by the

1 government -- you would then say, we have no intent to kill him.

2 MR. LETTER: Exactly. And so if he said, ah, but I'm
3 on a list, this would get right to, well, just being on a list
4 most of the time is not injury. You'd have to show that there
5 is something flowing from that. And as you've correctly
6 identified, we would say there's nothing flowing from that.

7 THE COURT: So if he can't sue if he turns himself in,
8 and if he's killed, I think you would also say that the case is
9 moot.

10 MR. LETTER: I think that would be true.

11 THE COURT: And you say that the father can't sue.
12 This means that this is -- this challenge to a threatened
13 extrajudicial killing is free from judicial scrutiny. No one
14 has standing to bring the case, correct?

15 MR. LETTER: That's right, but the reason is because
16 there would be no injury. That's like saying I'd like to be
17 able to sue if somebody hits my car, and yes, you can sue if
18 somebody hits your car, but if nobody hits your car, you have no
19 injury, so nobody can sue. So this gets to the most --

20 THE COURT: In some circumstances threatened injury
21 can be the basis of a suit.

22 MR. LETTER: Yes. But we, as I say, we are making
23 absolutely clear, absolutely clear there would be no threat of
24 injury in that circumstance. There would be no realistic threat
25 of extrajudicial killing, and therefore this would fall under

1 any of the standards for standing.

2 THE COURT: And on injury in fact, does the plaintiff
3 have to show an independent constitutional claim here, or that
4 he has a cause of action under the alien tort statute, or
5 instead is all he has to show is the invasion of a legally
6 protected interest, and might that be less than actually having
7 a claim to bring?

8 MR. LETTER: Well, several answers, Your Honor. As he
9 has stated --

10 THE COURT: Do I get to pick which one?

11 MR. LETTER: I'll start with whichever one you want.
12 Let's start with the direct claim that he makes. He claims that
13 he is bringing an action, the plaintiff, when I say "he" -- and
14 by the way, what I'm doing is I'm calling Al-Aulaqi the son and
15 the father the plaintiff. The plaintiff says he's suing under
16 the alien tort statute in his own right, and so that doesn't
17 involve third party standing.

18 THE COURT: We'll get to that in a moment, but we're
19 not sure exactly what he's saying.

20 MR. LETTER: I thought that's what he was alleging.

21 THE COURT: I thought that originally, but in the
22 reply brief I'm not so sure that's what he's saying.

23 MR. LETTER: Well, if he is suing in his own right
24 under the alien tort statute, again, this is yet another
25 instance when the plaintiff is asking you to go very far out on

1 a limb. In light of Sosa, the Supreme Court's decision about
2 the alien tort statute, it makes clear that that statute does
3 provide for jurisdiction, but only in a very limited set of
4 circumstances. And the claim here, I suppose -- all we've been
5 able to think of that the father would have is something like
6 intentional infliction of emotional distress.

7 THE COURT: I think in the reply papers they disavow
8 that, but we'll get to that in a moment.

9 MR. LETTER: Then we can't think of what claim they
10 would have. The D.C. Circuit had has made clear there is no
11 constitutionally protected right --

12 THE COURT: Maybe they think they have a third party
13 standing context that they can assert there as well.

14 MR. LETTER: If my friends here make that argument, I
15 welcome that, because Al-Aulaqi can't bring an alien tort
16 statute suit; he's a citizen, he's a U.S. citizen. He's not an
17 alien. A next friend suit or third party suit, you're suing,
18 bringing the rights of the third party, under the alien tort
19 statute, there are none.

20 THE COURT: So back to the question. There is no
21 claim that can be brought, no cause of action, not even a legal
22 ly protected interest with respect to the alien tort statute.

23 MR. LETTER: That's right. That's right.

24 THE COURT: And what about with respect to the
25 constitutional claims and perhaps some interest deriving from

1 the parent-child relationship? That may be less than a cause of
2 action, but it may be a legally protected interest.

3 MR. LETTER: I believe, Your Honor, that the D.C.
4 Circuit has cast very serious -- I was going to say very serious
5 doubt, but I think it's more than that.

6 THE COURT: They said there's no 1983 claim.

7 MR. LETTER: Right. Which would be therefore based on
8 a constitutional claim, and the D.C. Circuit said with an adult
9 child and a parent, there isn't any constitutionally protected
10 relationship. And obviously a competent child, adult child.

11 So it's very difficult to see what constitutional claim
12 there would be for the plaintiff, in addition to which,
13 Your Honor, remember, the plaintiff is an alien outside the
14 United States with no apparent substantial connection to the
15 United States. So under the precedent of this circuit, the
16 plaintiff has no claims under the Constitution anyway. So
17 that's not something that the plaintiff can bring.

18 THE COURT: But at some point the father could have
19 a -- depending upon how things play out, could have a wrongful
20 death claim, correct? A few things would have to happen.

21 MR. LETTER: If he were representing the son's estate.

22 THE COURT: That's what he would have to have happen.

23 MR. LETTER: Right. And there's several problems with
24 that, Your Honor, is one, if we're talking alien tort statute,
25 the son's estate would undoubtedly be based on the son's status

1 when he was killed, and the son, as I say, he is a U.S. citizen.
2 So the alien tort statute is out.

3 As far as constitutional claims, it's very difficult to
4 figure out what at that point -- we would be dealing with a
5 totally different lawsuit because the son would be deceased.

6 THE COURT: This is a question in third party
7 standing. In third party standing is it your position that the
8 plaintiff has to show injury in fact as to the claim that third
9 party standing relates to? Or can the plaintiff show simply a
10 legally protected interest that may not be that claim? But it
11 has to be, as you said, related, deriving out of the same core
12 events.

13 MR. LETTER: Your Honor, as I and my colleagues read
14 the case law, it's that the plaintiff has to have standing in
15 his own right to sue.

16 THE COURT: Then what's third party standing mean, if
17 the plaintiff has to have standing anyway?

18 MR. LETTER: Because what it does, Your Honor, is it
19 allows the plaintiff to raise related claims that other people,
20 such as a doctor being able to raise a patient's claim.

21 THE COURT: Why isn't that the situation here? But
22 you're saying the doctor in that situation has to have an injury
23 in fact with respect to one of the claims being raised on behalf
24 of the patients? I don't think that's right.

25 MR. LETTER: And I'm not saying that, Your Honor.

1 THE COURT: I think the doctor only has to have a
2 legally protected interest, some cognizable interest, and it
3 doesn't have to be in that claim that is being brought on behalf
4 of the patient.

5 MR. LETTER: I may not be being clear, but let me try.
6 My understanding of the case is the doctor has to have standing
7 in his own right to sue. If he has that, then he also can raise
8 related claims --

9 THE COURT: That's where I was at the beginning.

10 MR. LETTER: Okay. But he still has to have that
11 initial Article III standing --

12 THE COURT: And that Article III standing doesn't
13 require a cause of action; it only requires some kind of legally
14 protected interest, which may be slightly different from or less
15 than a cause of action.

16 MR. LETTER: I would rephrase it slightly, Your Honor.
17 I would say a legally cognizable interest would be --

18 THE COURT: That's fine.

19 MR. LETTER: As I say, it's very difficult to see that
20 the father has any legally cognizable interest here, because
21 again --

22 THE COURT: What if there were a wrongful death
23 statute in D.C. that said parents can sue for the wrongful death
24 of their children regardless of the child's age, because the
25 parent, under our D.C. statute, has a legally cognizable

1 interest in maintaining a relationship with the child? Would
2 that be sufficient?

3 MR. LETTER: I could see several problems with that.
4 First, as you know, that's not this case. We wouldn't be here
5 for injunctive relief, et cetera. So very different.

6 THE COURT: But I am free to ask hypotheticals,
7 Mr. Letter. So please go ahead.

8 MR. LETTER: Yes. And as Justice Scalia said, I'm
9 free to look at my cuff and say that is not this case. And then
10 you can yell at me. And obviously there the plaintiff has some
11 sort of -- there would be an appropriate venue and the plaintiff
12 would be covered by that statute. In order to bring a wrongful
13 death action, there would have to be a waiver of sovereign
14 immunity also. And so it would have to be some sort of statute
15 by Congress that would waive immunity in order to sue the
16 President --

17 THE COURT: This is where I disagree with you. If
18 there is that legally cognizable interest, it doesn't matter if
19 it can be brought in federal court as a constitutional claim.
20 It's still a legally cognizable interest that then may give
21 rise, because that gives injury in fact to third party standing,
22 to raise constitutional claims on behalf of the son.

23 MR. LETTER: So let me -- I'm trying to work this out.

24 THE COURT: Now, it's all hypothetical because we
25 don't have such a statute. But that's how I think this all fits

1 together if there is a legally cognizable interest in the
2 father.

3 MR. LETTER: So if Al-Aulaqi -- we're positing a
4 situation where Al-Aulaqi is now deceased, and the father is now
5 saying I would like to bring a suit. I'm not sure why it would
6 be third party standing at that point. If there were some
7 statute under which he could sue, then he would bring a first
8 party claim. If instead it were a third party claim, it would
9 be, what, on behalf of the estate? And again, it might very
10 well be that if Al-Aulaqi is deceased, then maybe the father or
11 somebody else could bring a claim on behalf of the estate.

12 But at some point somebody's going to have to demonstrate a
13 waiver of sovereign immunity in order to be able to sue these
14 defendants, the President and the Secretary of Defense and the
15 director of the CIA.

16 THE COURT: You don't have to demonstrate the waiver
17 of sovereign immunity necessarily for a wrongful death claim.
18 He may not be bringing the wrongful death claim, even if he has
19 a legally cognizable interest.

20 But in any event, I think we've beaten the injury in fact
21 issue to a pulp. Why don't you tell me, if there is injury in
22 fact on the part of the father, the plaintiff, are there
23 nonetheless prudential reasons for not allowing third party
24 standing?

25 MR. LETTER: Most definitely, Your Honor. And these

1 very much overlap with each other. And when you say prudential,
2 they are things that go to the justiciability of the dispute.
3 One would be, as we've argued, equitable discretion, that as
4 Your Honor knows well, the courts have made clear that an
5 injunction against the President for anything that involves any
6 kind of discretion, et cetera, is not permitted.

7 THE COURT: There is this concept out there, and what
8 cases do you rely on in which a court has, number one, found
9 third party standing but nonetheless exercised equitable
10 discretion not to consider the case, or, the next situation,
11 found that the case is not barred by the political question
12 doctrine, but found nonetheless, because of equitable
13 discretion, that the case should not be heard? Are there cases
14 that do either of those two things?

15 MR. LETTER: On the first question, no, I'm having
16 trouble -- I'm running in my mind through the third party
17 standing cases that I can remember, and I can't recall that any
18 of them are against the President of the United States.

19 As far as whether, once a court has found there is no
20 political question --

21 THE COURT: It seems to me to be an odd position that
22 the government is taking here with respect to political
23 question, and I think you are taking this position, that even if
24 I were to conclude that the political question doctrine does not
25 bar this case, I nonetheless, because of the concept of

1 equitable discretion, should decide that the Court shouldn't
2 hear this case. That seems to me to be an odd posture, and I
3 don't think there's any case that has ever done that.

4 MR. LETTER: Your Honor, what I would instead ask you
5 to do, and giving you a direct answer, I'm having trouble
6 thinking of any also. What I would ask you to do though instead
7 is, instead of pulling these doctrines apart, is to view them as
8 interrelated. I think that is the strength of our argument.

9 As we know, Mississippi v. Johnson, the Supreme Court said
10 we don't issue injunctions against the President in situations
11 like this. Now, there's some case law saying, that the
12 plaintiff has raised, you can issue an injunction against lower
13 level executive branch officials. I don't think any of those,
14 though, are situations like this. Not I don't think. I know
15 none of them is like this, where we're going to the very core
16 powers of the President as commander in chief and the person
17 responsible for, most responsible for protecting national
18 security.

19 So this is something that goes right to the heart of the
20 presidency and the commander in chief powers. There is no
21 case --

22 THE COURT: If so, you would think the political
23 question would bar it, but you would say even if it doesn't, I
24 should nonetheless erect this other doctrine to bar it.

25 MR. LETTER: I'm not asking you to erect it. It's

1 there already, but let's put them together, Your Honor. Let's
2 put them together. Political question doctrine --

3 THE COURT: We've moved off of third party standing.
4 If you have nothing further to say on third party standing, then
5 I'm comfortable with you moving to the next issue.

6 MR. LETTER: It sounds to me like Your Honor has
7 probably a better grasp of third party standing than I do, so I
8 don't think there's more for me to --

9 THE COURT: That will get you nowhere, Mr. Letter.

10 (Laughter)

11 MR. LETTER: So as far as -- before we even get to
12 these justiciability doctrines, I did want to toss in, there is
13 nevertheless the Article III problem of you can't just sue and
14 say I think something unconstitutional may happen here.

15 THE COURT: The speculative nature of this.

16 MR. LETTER: Exactly. Exactly. And this gets into
17 the Supreme Court's decision in Lyons where here there is no
18 indication, none, that the executive would use lethal force or
19 target somebody for lethal force inconsistently with the
20 Constitution. The only indications are --

21 THE COURT: There's some indication that the executive
22 might target someone for lethal force in this situation.

23 MR. LETTER: Yes. And the legal advisor, Dean Koh,
24 has spoken on this publicly and for attribution, and he made
25 clear, though, and this is key, because what he said is that

1 "U.S. targeting practices" -- I'm quoting very briefly --
2 "including lethal operations conducted with the use of unmanned
3 aerial vehicles comply with all applicable law, including the
4 laws of war."

5 So this official statement is that if we're going to use
6 lethal force, we do so consistent with all applicable laws.

7 And so the plaintiff has said, ah, but we think there's
8 information that Al-Aulaqi has been on some sort of lethal force
9 list, or can be on a lethal force list for an extended period.
10 But that doesn't show anything. There obviously can still be a
11 threat of imminent harm.

12 THE COURT: But how firm does this threat have to be?
13 How certain does the impending injury have to be? We do have
14 cases in the Steffel v. Thompson line of cases that certainly
15 say even though it's somewhat speculative and not certain,
16 that's still sufficient.

17 MR. LETTER: Right.

18 THE COURT: Particularly when constitutional issues
19 are at play, although there we're talking about the First
20 Amendment.

21 MR. LETTER: Your Honor's exactly right. I can't
22 stand here and say it's a clear line and here's where it is.
23 The Supreme Court and the courts of appeals have not given us
24 the clear line. What we do know -- and so there are decisions
25 like Babbitt, where there, I think if you parse the decision

1 closely, the Supreme Court there said certain things were
2 actionable and certain things were not. And the parts that
3 seemed conjectural is where the Court dismissed. The parts that
4 instead, where the plaintiffs there had acted in a way that
5 would bring the power of the statute down on the man, they
6 announced they would like to do that in the future, the Court
7 found standing.

8 And added to this obviously is the Supreme Court's decision
9 of a couple of terms ago in Iqbal that I think helped guide the
10 lower courts in at least the range of conjecture that is
11 inappropriate. And once again, I think Lyons is our best case
12 on that.

13 THE COURT: All right. Let's go beyond standing.
14 Where do you want to go now, alien tort statute or political
15 question?

16 MR. LETTER: I'd like to go to political question.
17 I've got a little more to say on alien tort statute, but I think
18 we've largely covered it.

19 THE COURT: Then let's stick to that for a second.
20 Why hasn't the government raised the standing argument here on
21 alien tort statute?

22 MR. LETTER: Well --

23 THE COURT: Is it because of what you said earlier,
24 that if this is a third party standing situation, then it
25 doesn't make any sense because Anwar Al-Aulaqi can't bring an

1 ATS claim?

2 MR. LETTER: Precisely right. The father can bring an
3 alien tort statute claim, but Sosa makes absolutely clear that
4 some sort of odd notion that isn't even recognized in all the
5 states in the United States, it's certainly not part of the
6 recognized law of nations. Some sort of bystander intentional
7 infliction of emotional distress is obviously so different from
8 the types of causes of action that have been recognized under
9 the alien tort statute. And again, he clearly cannot sue as the
10 son.

11 THE COURT: Is it the United States' position that an
12 alien tort statute claim cannot be brought against the
13 United States?

14 MR. LETTER: Yes, Your Honor. We do not believe that
15 there is any proper waiver of sovereign immunity.

16 THE COURT: Either an injunctive claim or a damages
17 claim?

18 MR. LETTER: Right. And on injunctive claim,
19 Your Honor, the plaintiff cites two decisions, Von Dardel which
20 was reversed, and the other is a district court decision in the
21 Kadic case, Karadzic. Both of those precede Sosa. It is very,
22 very difficult to see that the principle there would survive the
23 Supreme Court's instructions in Sosa.

24 THE COURT: So in 1789 you think the Congress of the
25 United States was creating a statute -- it's an odd statute, we

1 all know.

2 MR. LETTER: It is.

3 THE COURT: But was creating a statute to give
4 jurisdiction only to an alien to sue a foreign government, for
5 instance, for seizing property on the high seas, not to allow an
6 alien to sue the United States for seizure on the high seas.

7 MR. LETTER: Right. I have one quibble with what you
8 just said, Your Honor. It was providing that a plaintiff alien
9 could sue somebody else.

10 THE COURT: But not the United States.

11 MR. LETTER: Correct. So piracy, for example, is not
12 going to be carried out by a foreign state, but instead by
13 individuals. But that's exactly right, Your Honor. And the
14 D.C. Circuit, I think then-Judge Scalia in Sanchez-Espinoza, I
15 believe, makes this clear, that the precedent of this circuit at
16 least is this type of suit cannot be brought against the
17 United States. It's hard to see again how it would be brought
18 against the President of the United States.

19 THE COURT: Political question.

20 MR. LETTER: Political question, Your Honor. What
21 we've argued here is the types of matters that Your Honor would
22 have to look into, and then most importantly the judgment that
23 plaintiffs would be asking you to enter, particularly either an
24 injunction against the President or a declaratory judgment that
25 is designed to limit actions by the President -- after all, why

1 would you issue a declaratory judgment if the plaintiffs and you
2 didn't think it was going to have an impact on the President?

3 THE COURT: Let me ask you this hypothetical question.
4 Would the United States claim political question as to an
5 after-the-fact challenge to the extrajudicial killing of Anwar
6 Al-Aulaqi?

7 MR. LETTER: Your Honor, it might do so. For example,
8 the Aktepe case from the 11th Circuit.

9 THE COURT: If the case involved looking into the
10 criteria, whether the United States abided by the Constitution
11 in killing him, wouldn't you claim political question as to
12 that?

13 MR. LETTER: I believe we would, Your Honor. Because
14 you would be asked to make the same kinds of determinations post
15 as you would prior. Now, obviously, though, the prior is even
16 more problematic. An ex ante injunction or declaratory judgment
17 against the President in military and intelligence sort of
18 matters is very difficult to contemplate, and as we started out
19 with, I'm not aware of a single instance when it's ever been
20 done.

21 THE COURT: Let me ask the question that plaintiff has
22 asked. Slightly modified. How is it that judicial scrutiny is
23 required when the United States decides to target a U.S. citizen
24 overseas for electronic surveillance, and judicial scrutiny is
25 permitted when the United States takes the property of U.S.

1 citizens overseas, but judicial scrutiny is prohibited, in your
2 view, on the political question doctrine, when the United States
3 decides to target a U.S. citizen overseas for death? How does
4 that all make sense?

5 MR. LETTER: Okay. The first question, as we know --
6 and again, you know better than I do, Congress has by statute
7 provided that under certain circumstances, we need the -- some
8 sort of order is needed before surveillance can be targeted
9 against a U.S. citizen. So Congress has provided that by
10 statute. As far as taking of property of a U.S. citizen
11 overseas --

12 THE COURT: That's basically D.C. Circuit cases that
13 reject political question.

14 MR. LETTER: Yes. The difference is there you're not
15 being asked to stand at the shoulder of the President as the
16 President is trying to decide is there an imminent threat to the
17 security of U.S. nationals posed by the leader of a highly
18 active terrorist organization.

19 THE COURT: That's why I asked you the question in the
20 first instance whether you would assert political question even
21 after the fact, and you said you would.

22 MR. LETTER: I think we would. Now, obviously -- I
23 think Mr. West rather than me would make the decision about
24 whether we would, but I think all indications are that it would
25 normally fall within that. So yes, Your Honor.

1 But also, as I say, it's the direct military aspect of it
2 that I think is central and is such a principal part of our case
3 here that any hypotheticals that move into different --

4 THE COURT: As opposed to the intelligence aspect of
5 listening to someone, electronic surveillance? What's the
6 difference between intelligence and military in the context of
7 political question? I don't think there is any, is there?

8 MR. LETTER: Here, Your Honor, obviously because of
9 the defendants, the military and the intelligence aspects are
10 all pulled together into -- and because the President is the
11 defendant. In the situation you raised, though, again I would
12 fall back on the Congress --

13 THE COURT: Congress has said so.

14 MR. LETTER: That's right. And the key thing here
15 is --

16 THE COURT: By the way, do you assert the political
17 question with respect to the alien tort statute claim?

18 MR. LETTER: We haven't done so specifically. I think
19 in part because we felt we didn't need to because it was so
20 obvious.

21 THE COURT: Well, assume you need to.

22 MR. LETTER: If we need to, yes, the same factors
23 would enter --

24 THE COURT: Even though it's a statutory claim. The
25 concurrences in El-Shifa would say no, no, no, political

1 question isn't available with respect to a statutory claim.

2 MR. LETTER: Right. But the majority went the way the
3 government argued, so it rejected that argument. So yes, the
4 alien tort statute claim would also be subject to political
5 question, especially to the extent that -- well, as we know,
6 plaintiffs here are not asking for damages. They're asking for
7 injunctive relief, and so that wouldn't change one iota.

8 And we covered equitable discretion. I don't think there's
9 anything more -- oh, the one other thing I wanted to bring to
10 Your Honor's attention, I know we did it in the briefs, is I
11 think the very strongest case that we have for us is Gilligan v.
12 Morgan, where what the plaintiffs there were seeking is
13 something very similar to what is being sought here. The Court
14 to --

15 THE COURT: Political question was not the only
16 argument there.

17 MR. LETTER: Correct. Although there, as I recall,
18 the Supreme Court said that aspects of mootness entered into it,
19 but the Court, as I recall, I think it was Chief Justice Burger
20 did not rely on mootness, and instead the Court went beyond that
21 and said this is just clearly not justiciable; for the judiciary
22 to get involved with an ex ante order to the military --

23 THE COURT: Although, the Court in Gilligan said that
24 it would have been a different case if that case involved an
25 action seeking a restraining order against some specified and

1 imminently threatened unlawful action. Why isn't that just what
2 we have here?

3 MR. LETTER: Your Honor, I think what the Court there
4 was saying, though, was it wasn't necessarily focusing on one
5 specific act, because here you wouldn't be focusing on one act.
6 You would have to be looking at a range of things. You would
7 have to be examining, is Al-Aulaqi an imminent threat to the
8 United States and the safety of its citizens? What is the role
9 of AQAP? AQAP and al-Qaeda, are they indeed tied together and
10 how closely? Are there alternatives? What's the relationship
11 currently? At any moment between the United States and Yemen,
12 would the United States be able to carry out something, an
13 activity like this? Does the United States have alternatives
14 such as the plaintiffs have said? All of those would factor in.
15 And I think the breadth of those makes it much more like the
16 Gilligan decision.

17 THE COURT: The reference to Gilligan brings to mind
18 the fact that, except for that case that really has no
19 application here, I don't think, the Walter Nixon case, Gilligan
20 is the only case in which the Supreme Court has applied
21 political question since Baker v. Carr, I think, except for
22 Walter Nixon. Those two cases.

23 MR. LETTER: I'd like you to go back to the Walter
24 Nixon case, because I litigated that.

25 THE COURT: So as I said, it has no relevance here.

1 (Laughter)

2 MR. LETTER: But the reason Nixon is relevant is
3 because that was a clear constitutional claim, so we can't say
4 oh, if it's a constitutional claim, it's outside political
5 question.

6 THE COURT: But what should I take from the fact that
7 political question is applied by the Supreme Court so
8 infrequently?

9 MR. LETTER: Very interesting question, Your Honor,
10 but here is what I think is very important. Notice that the
11 D.C. Circuit and its sister circuits have issued a number of
12 political question decisions where they have dismissed actions.
13 The Supreme Court has taken cert in none of these. So it's not
14 as if the Supreme Court has rejected political question
15 arguments regularly. Far from it.

16 THE COURT: Although a lot of academics and even
17 judges say that it's a doctrine with no real foundation that
18 really winds up just being an ad hoc application to various
19 factual circumstances.

20 MR. LETTER: In one sense it's ad hoc, but that's the
21 way it's supposed to be. It's supposed to be the Court looking
22 at the very specifics of the situation. We are not arguing for
23 a very broad doctrine; we're arguing that political question
24 does require a very ad hoc analysis.

25 But I repeat, I think maybe one of the best explanations

1 for this is the Supreme Court really hasn't had to use the
2 political question doctrine, because the courts of appeals are
3 applying it and doing so appropriately, but -- such as both
4 El-Shifa cases, the D.C. Circuit and the prior federal circuit
5 one that was so heavily relied upon by the D.C. Circuit, and if
6 anything the prior case is so closely on point here, an attempt
7 to get judicial review of a military action by the President of
8 the United States.

9 THE COURT: My last question I think on political
10 question is this. There is a second prong of Baker v. Carr,
11 which is the judicially manageable standards. It isn't that
12 different from the first prong or the first factor. But I guess
13 my question is, if it's your view that the courts are
14 ill-equipped to evaluate the array of sensitive and complex
15 information upon which the President and his advisors in the
16 national security arena and its military advisors would rely on,
17 and I think that is your position --

18 MR. LETTER: Yes.

19 THE COURT: -- how is it that courts post Boumediene
20 routinely assess the merits of executive detentions for national
21 security reasons, looking at those detentions and whether they
22 comport with the national security reasons that the executive is
23 articulating, based indeed on, in many of them, on the al-Qaeda
24 connections of the individual detainee in those habeas actions?
25 And how is it that -- and they do so through, I think some would

1 argue, but they do so through what the courts at least have
2 decided are judicially manageable standards. The Supreme Court
3 left it to the district courts to develop those.

4 And how is it that the courts also, a specialized court
5 nonetheless, in applications for authorization of electronic
6 surveillance of a U.S. person, under the Foreign Intelligence
7 Surveillance Act, a judge often decides whether there's probable
8 cause to conclude that the target is an agent of al-Qaeda?
9 Those are the same kinds of determinations that you're saying
10 the courts aren't equipped to make here. So how is it that they
11 can be making them in those contexts, but somehow they're not
12 equipped to make them here?

13 MR. LETTER: Because let's look, Your Honor, there's
14 some very important differences. One is, especially with regard
15 to the detention cases, the habeas cases, there's the ex ante
16 aspect to it. In the detention cases the question is is
17 somebody going to continue to be held in long-term detention,
18 and that obviously is very different from an injunction --

19 THE COURT: Why is the judicially manageable standard
20 issue any different? You're still looking essentially at
21 factual and legal questions relating to whether the individual
22 is part of al-Qaeda.

23 MR. LETTER: Because, Your Honor, for example, the
24 kinds of things that I think you wouldn't be taking account --
25 looking closely at in that context is exactly what El-Shifa, for

1 instance, and Aktepe, both El-Shifa decisions and Aktepe noted,
2 you would have to look at, first of all, if you were going to
3 look at the imminence of the threat, that may be constantly
4 changing, whereas in the detention cases, things aren't
5 changing. It's a question of when the person was arrested or
6 captured and whether they should continue to be detained.
7 Your Honor and your fellow judges have been looking at what were
8 the facts at the time of the capture.

9 That obviously is totally different from a situation where,
10 as I say, what the plaintiffs would want you to do --

11 THE COURT: Well, if they brought someone to
12 Guantánamo -- and I'm not saying that anyone is going to do
13 this, but if they brought someone to Guantánamo who was captured
14 last week, then the courts, under the existing case law, would
15 be looking at the situation as of last week.

16 MR. LETTER: As of last week, but remember, what the
17 plaintiffs want you to do, by issuing an injunction, I guess we
18 would be in a situation where the President might be calling you
19 at 2 in the morning saying you issued this injunction, but
20 here's the intelligence that I just got, and I would like to act
21 on this, may I? There's no parallel in the detention situation.

22 THE COURT: So it is the ex ante context that is
23 fundamentally important here.

24 MR. LETTER: Very key part of it, but also --

25 THE COURT: Although that doesn't apply in the

1 electronic surveillance context.

2 MR. LETTER: Yes. I was going to get to that. Thank
3 you, Your Honor. But the other point that, as you know, you
4 don't really focus on in the detention situation is what's the
5 current relationship, not just with the country where the person
6 is, the target is; there is also the question of what's the
7 capability of the United States? Because if we assume, if we
8 assume that one of the factors -- and again, this is something
9 that Dean Koh did discuss -- if one of the factors is
10 alternatives --

11 THE COURT: And that's what they, the plaintiff here,
12 would say is one of the parts of the test.

13 MR. LETTER: So if you were going to look at
14 alternatives, then again that's something that would have to be
15 weighed right at that moment. And again, this has absolutely no
16 relationship to the detention situation.

17 THE COURT: I've kept you long beyond the 40 minutes
18 that you wanted to spend, so I do want to give you a chance to
19 say anything that you wish to say with respect to state secrets.

20 MR. LETTER: Your Honor, actually, all I'd like to do
21 on state secrets, if Your Honor has questions, I'm happy to
22 answer them. Otherwise, I simply want to reiterate that we
23 believe we've provided Your Honor with a variety of ways of
24 dismissing this case, and that you do not have to, and therefore
25 we urge you not to reach state secrets. As I say, if you have

1 questions, I'll answer them, but otherwise we just don't think
2 that it's something that should be --

3 THE COURT: And the reason I shouldn't do that, the
4 reason that in my order dealing with justiciability and other
5 issues, that should come at the end, is?

6 MR. LETTER: The Attorney General has announced and
7 implemented a policy that indicates that the state secrets
8 doctrine, particularly for dismissal, is something that the
9 executive will only use and the courts really then should
10 address only as necessary. Part of that, in a case like this,
11 it's not -- what's necessary may vary from case to case, but in
12 a case like this one, where there are what we think are quite
13 strong and obvious grounds for -- alternative grounds for
14 dismissal, that necessary, again, in this case would only be if
15 you have rejected those. If you have rejected those, we think
16 the state secrets argument is airtight.

17 THE COURT: Let me ask one question. It's probably
18 going to be one of my long, multipart questions, and it's
19 similar to what I've already asked you in another context. If I
20 were to reach the merits, would I need to determine whether
21 al-Qaeda in the Arabian Peninsula -- AQAP we'll call it -- is
22 within the scope of the AUMF? To use the Washington acronyms to
23 the maximum extent possible. Is that an issue that I would have
24 to reach, and would that issue require examination of the
25 relationship between AQAP and what has traditionally been

1 thought of as the core or central al-Qaeda? And can I undertake
2 that without getting into state secrets? In other words, can I
3 undertake that assessment based on the growing volume of
4 publicly available material, or do I have to look at state
5 secrets?

6 MR. LETTER: Your Honor, I would like to consult with
7 my colleagues for just one moment if you please.

8 (Counsel conferring.)

9 MR. LETTER: Your Honor, I apologize.

10 THE COURT: Quite all right.

11 MR. LETTER: As you know, we have asserted the state
12 secrets privilege over the relationship between those. Now,
13 there is public information about that. In fact, we have stated
14 public --

15 THE COURT: There's a lot of public information.

16 MR. LETTER: Yes. However, part of the privilege
17 assertion is there undoubtedly would be more information on that
18 very issue that would be covered by state secrets, and therefore
19 would be taken out of the case. And if I may, I know you're
20 aware of this, but I'll say it anyway. Remember that we have
21 also asserted that the relationship between those two is the
22 President has made a determination, and that too is a political
23 question.

24 THE COURT: But isn't that just -- again, to say
25 something that I've sort of already said before, isn't that just

1 the kind of inquiry, dealing with the relationship of an
2 individual or an entity to al-Qaeda, precisely what all the D.C.
3 district judges are undertaking with respect to the Guantánamo
4 detainees? If you look just at that inquiry, that's exactly
5 what they're doing.

6 MR. LETTER: Right. Except, Your Honor --

7 THE COURT: And it's essentially, because it involves
8 the AUMF, a question of statutory interpretation, which is what
9 the courts are used to doing.

10 MR. LETTER: Your Honor, you make a very fair point.
11 However, it's still a political question because we don't
12 think --

13 THE COURT: We're into state secrets now.

14 MR. LETTER: Okay. I'm sorry. It's definitely still
15 within the state secrets privilege because, as we said, there
16 would be additional information that we would not be relying on
17 for the merits. Remember that. This is something that is often
18 a major mistake that a lot of people make as far as state
19 secrets. The government doesn't assert state secrets and then
20 say see, Your Honor, you looked at the material, you see we're
21 right. That's not our argument.

22 And therefore, if it were -- it goes back to what you said
23 before. You could rule for the government, despite the
24 assertion of the privilege, but you couldn't rule against it.
25 Because if you said, well, based on the public information I

1 find that the President has correctly determined that there is a
2 relationship and therefore it is covered by the AUMF. But you
3 wouldn't be able to disagree, because that would require you to
4 get into the information that would be covered by the privilege,
5 and that again would be taken out of the case.

6 THE COURT: All right.

7 MR. LETTER: I hope that answers the question.

8 THE COURT: All right. Let's give someone else a
9 chance. You'll still have some time in rebuttal.

10 MR. LETTER: Thank you, Your Honor.

11 THE COURT: Mr. Jaffer, will it be you first?

12 MR. JAFFER: Yes, Your Honor. Thank you. Your Honor,
13 if it's okay with you, I'm going to begin with standing and
14 state secrets, but my colleague is going to address issues
15 relating to the political question doctrine and the ATS claim.
16 And I hope we'll be able to cover your questions between us.

17 We would frame this case very differently than Mr. Letter
18 has. In our view, this is a case concerning the government's
19 authority to carry out the targeted killing of an American
20 citizen whom the executive branch has unilaterally labeled an
21 enemy of the state. And the question is whether the courts have
22 any role whatsoever to play in articulating the scope of that
23 authority or policing its exercise.

24 The government, obviously, says no. But if the Fourth and
25 Fifth Amendments mean anything at all, surely they mean there

1 are limits to the circumstances in which the government can use
2 lethal force against one of its own citizens. And again, the
3 courts have a role to play in delineating those limits and
4 ensuring that they're complied with.

5 So again, Your Honor, I do want to address standing, but I
6 would like to just make three broader points about the
7 government's arguments just now.

8 First, the government repeatedly insisted that the Court
9 should defer to the political branches. And I think that it's
10 important to be clear here that this isn't a situation in which
11 everybody agrees that Congress and the President have spoken
12 with one voice. This isn't a situation like that at all. The
13 allegation here is that the President is exercising authority
14 beyond what Congress has granted him. And as the Supreme Court
15 said in Youngstown, that's a situation in which, again, if you
16 assume that we are right about the President's actions in
17 relation to the AUMF, the President's powers are at their lowest
18 ebb.

19 And if the Court simply defers to the President's
20 construction of the AUMF in this context, it's not deferring to
21 the political branches, it's deferring to the President.

22 THE COURT: Well, in deciding on standing or political
23 question, or state secrets, I wouldn't be deferring to their
24 construction of the AUMF in any of those situations, would I?
25 They're all independent reasons not to reach the claims. It's

1 not a situation where I would be deferring to their assessment
2 under the AUMF.

3 MR. JAFFER: I think that's exactly how you should
4 approach the question. The reason I bring it up, though, is
5 because both in its briefs and in Mr. Letter's oral argument,
6 the government has insisted many times that this is a context in
7 which Congress -- in which the political branches have spoken
8 together. And I just think it's important, even as a kind of
9 atmospheric matter, to get that cleared up.

10 THE COURT: So if the political branches don't speak
11 together or clearly, that means the Court should be more willing
12 to dive in to resolve it?

13 MR. JAFFER: Well, it's not so much a question of
14 clearly, Your Honor, it's a question of whether there is an
15 allegation that -- a colorable claim that the President has --

16 THE COURT: It seems to me that the situation where
17 the political branches are quarrelling and aren't seeing eye to
18 eye is exactly the situation where the courts should stay out of
19 it.

20 MR. JAFFER: No. I don't think that's right at all,
21 Your Honor. I think if you were to stay out of it in that kind
22 of context, you would be depriving Congress of the ability to
23 meaningfully limit the President's use of military force. And
24 this is a situation where the government is relying on the AUMF,
25 and almost entirely on the AUMF. They're pointing to the AUMF

1 as the authority, as the statute that gives them the authority
2 to carry out -- well, to use all necessary and appropriate
3 force.

4 THE COURT: I don't think they're relying only on the
5 AUMF. I think they're also relying on the principles of
6 self-defense and Article II power.

7 MR. JAFFER: Right. And that's why I said almost
8 entirely, because you're right, they do invoke self-defense as
9 well. But insofar as they rely on the AUMF, the AUMF is
10 something that Congress obviously has enacted. It has limits to
11 it. And if Congress is going to be able to limit the
12 President's use of military force -- and the government hasn't
13 contended that Congress can't do that -- then Congress -- then
14 you have to enforce those limits.

15 THE COURT: But it seems to me that you're painting a
16 path where either you or I step in in the place of Congress,
17 because you think Congress hasn't limited or is somehow
18 constrained in its ability to limit, and therefore I should jump
19 in, or you should pull me in.

20 MR. JAFFER: I didn't mean to make an argument that
21 broad, Your Honor. This is a situation in which we are
22 asserting the individual rights of a U.S. citizen. I think
23 that's what makes this case a case in which the Court has not
24 just the authority but the responsibility to step in.

25 I didn't mean to suggest that any time there's a

1 disagreement between Congress and the executive branch, the
2 Court has an obligation or even the authority. It's a narrower
3 point than that. Again, it's a more general point relating to
4 the entire brief. I don't want to get completely distracted by
5 it.

6 THE COURT: Nor will I.

7 MR. JAFFER: Two other more general points,
8 Your Honor.

9 THE COURT: Other opportunities for me to get
10 distracted, but go ahead.

11 (Laughter)

12 MR. JAFFER: All right. One is about the claim that
13 we are asking the Court to stand at the shoulder of the
14 President and oversee the President's targeting decisions. And
15 I just want to make sure that there's no lack of clarity about
16 what it is that we're asking the Court to do. So we haven't
17 proposed that the Court oversee the President's real-time
18 targeting decisions. We are not asking for something akin to a
19 prior warrant requirement where the government goes to the court
20 with evidence of an imminent threat, evidence that there are no
21 means short of lethal force that can be used to address the
22 threat. We are not asking for the Court to get involved at that
23 point at all with those kinds of targeting decisions.

24 What we are asking for, though, is that the Court be
25 involved in setting the general limits under which lethal force

1 can be used.

2 THE COURT: Well, you're asking for more than that.
3 You're asking for the Court to set those general limits and then
4 to be prepared to enforce them --

5 MR. JAFFER: Ex post.

6 THE COURT: -- ex post. If the President decides to
7 take some military action, I would then, I or my colleagues on
8 the bench would then be in a position to enforce the view that
9 the courts had come up with through contempt proceedings or
10 damages actions, against the President and the senior military
11 and defense officials of the United States. That does seem like
12 a fairly unusual construct.

13 MR. JAFFER: Well, Your Honor, I don't think it's as
14 unusual as the government makes it out to be. I'll tell you two
15 reasons why. One is that the courts routinely consider the
16 question of whether executive officers use excessive force.
17 Now, those cases are domestic, but they happen all the time, and
18 the question of whether force was excessive or not is something
19 that the courts consider all the time.

20 THE COURT: It's a pretty -- without any slight to
21 them, but it's pretty low-level executive officials if it is the
22 federal government involved. It's federal police officers
23 basically you're talking about.

24 MR. JAFFER: Your Honor, if I can, I'd like to
25 separate the question of the inquiry from the question of the

1 defendants, if that's the right way to put it, because I think
2 the government makes both points. One is that the inquiry is
3 something that the courts aren't capable of handling, and the
4 other is that you can't enjoin the President in this kind of
5 context.

6 But just to stick on the first point if I can for a second,
7 in the domestic context, those kinds of excessive force cases
8 are routine. The Supreme Court has handled half a dozen of
9 them, including Tennessee v. Garner, in which it set out a rule
10 not only for the case that it had just adjudicated, but a rule
11 that the courts have applied going forward.

12 THE COURT: Those are all after-the-fact -- although
13 they might be rules that apply going forward, the case is an
14 after-the-fact case.

15 MR. JAFFER: That's right, Your Honor. But the caveat
16 you just drew is an important one, which is that although they
17 are ex post cases, they often set up rules that are applied
18 going forward. Now, to be fair, the government isn't held in
19 contempt when it violates those rules, but damage actions
20 succeed when the government violates those rules.

21 So I don't think that the distinction between ex post
22 and -- I think there is a distinction between ex ante and
23 ex post, but the distinction is actually not as clear as the
24 government makes it out to be. So that's one point.

25 And the other thing I'd point Your Honor to with respect to

1 the question of whether courts can look over the government's
2 shoulder ex post, which is what we're proposing here, are the
3 Guantánamo cases, the Guantánamo detention cases. And those are
4 all cases involving noncitizens who were seized on an actual
5 battlefield and are threatened with continued detention.

6 And here we're talking about a citizen who is threatened
7 with death far away from any actual battlefield. And the same
8 inquiry that the courts engage in all the time in the Guantánamo
9 detention cases, is an inquiry that the government says is off
10 limits to the Court here.

11 THE COURT: And there are differences between the two
12 situations, one of which is, if we're talking about political
13 question, that the Guantánamo cases arise in the habeas context
14 where there's a specific constitutional reference to the courts
15 through the suspension clause. And here we have a slightly
16 different situation, where, to the extent the Constitution says
17 anything about military affairs, foreign affairs, and
18 intelligence, it's all, to put it in the hands of the political
19 branches, not in the hands of --

20 MR. JAFFER: But Your Honor, we also have the Fifth
21 Amendment, which says the government shall not deprive a person
22 of life without due process.

23 THE COURT: You're absolutely right, but if that were
24 the answer, then no political question case would ever apply the
25 doctrine because all of those cases, or a lot of them, involve

1 constitutional claims. So you can't look at the fact that it's
2 a constitutional claim, whether it be under the Fourth Amendment
3 or Fifth Amendment or whatever amendment. You have to look at
4 what the issues are, what they involve. And here what they
5 involve are military intelligence and foreign affairs.

6 MR. JAFFER: Your Honor, I don't take any general
7 disagreement with what you just said. My co-counsel will
8 address the political question point in more detail. But even
9 if you don't think the mere fact that we are asserting
10 constitutional claims is enough to make the political question
11 doctrine irrelevant -- and we don't actually suggest that it
12 is -- it's surely a relevant factor that we are asserting
13 constitutional claims on behalf of a U.S. citizen and asserting
14 a right --

15 THE COURT: Well, some judges of the D.C. Circuit
16 would say that political question doesn't even apply unless
17 there are constitutional claims being asserted.

18 MR. JAFFER: That's true, but those judges don't say
19 that the political question doctrine applies if there are
20 constitutional claims being asserted.

21 THE COURT: You're right there. That isn't
22 necessarily good for you, but you're right there.

23 MR. JAFFER: I've got through two of my general
24 points. The third one, and then I will get to standing, the
25 third one is that the government in its brief has said that this

1 is -- it's tried to cast the case narrowly as a case about what
2 kind of judicial review is available at this particular
3 juncture. But I just want to underscore what I think Mr. Letter
4 has just conceded. And I think this is actually evident in
5 their brief, although not stated as clearly.

6 They are not just arguing that the Court has no role to
7 play now. They're arguing that the Court has no role to play,
8 period. They're arguing that the question whether the President
9 can target a U.S. citizen for death is a question that is
10 committed to the executive branch now and committed to the
11 executive branch alone in the future; that the courts have no
12 role to play. And it's not again a situation where the
13 government can fairly say, well, Congress has authorized us to
14 do this, because that is precisely what is at issue in this
15 case. That's what we have challenged in this case.

16 We don't think that the AUMF extends to the extent that
17 they propose it does. And we're happy to save that sort of
18 merits argument, if that's the right way of characterizing it,
19 for another time. But we've spelled it out in the brief.

20 THE COURT: Now let's deal with the "we" that have
21 brought the case, or actually the plaintiff.

22 MR. JAFFER: Sure, Your Honor. So we, as you know,
23 have asserted standing on two different grounds. One is next
24 friend and the other is third party.

25 THE COURT: The government seems to think that third

1 party -- which did come late in the case, concededly -- that
2 third party shouldn't be really looked at because it's simply a
3 means that you're trying to employ to get around the fact that
4 you don't have next friend standing.

5 MR. JAFFER: Your Honor, with respect, I think there
6 are many hard questions in this case. I don't think that's one
7 of them. I think the cases are pretty clear, both from the D.C.
8 Circuit and the Supreme Court, that these are two different
9 lines, that you can establish standing as a next friend --

10 THE COURT: Any case that assesses in a single case
11 whether a particular plaintiff has either next friend or third
12 party?

13 MR. JAFFER: Yes. I believe Coalition of Clergy,
14 which is a case out of the Ninth Circuit, assessed both of those
15 things. And while we're on this point, Your Honor, the long
16 discussion you had with Mr. Letter about whether in the third
17 party context, plaintiffs have to establish that -- the litigant
18 has to establish an independent constitutional claim, I think
19 that too is easily cleared up by looking at cases like, well,
20 Your Honor's own case in Yaman, which was a passport case.
21 There was a mother who was complaining about the way her kids'
22 passports had been processed. Or looking at the Supreme Court's
23 decision in Craig v. Boren or the D.C. Circuit's decision in
24 Lepelletier.

25 Those are all cases in which the litigant was permitted to

1 raise third party standing even though the litigant not only had
2 no constitutional claim of his own or her own, but had no claim
3 of his own or her own. All they established was some injury.
4 Some injury. That was the only requirement. And I believe
5 that's the way -- "some concrete interest" is the phrase that
6 the Supreme Court used.

7 THE COURT: So what's the -- well, that's really a
8 third party question. Deal with next friend first.

9 MR. JAFFER: Sure, Your Honor. The government argues
10 first that the next friend standing is available only in the
11 context of individuals who are detained minors and mentally
12 incompetent -- or mentally incompetent. They are right that the
13 cases that have recognized next friend standing have fallen into
14 those boxes, but I don't think it's a fair reading of the cases
15 to find that you have to fall into one of those boxes in order
16 to establish next friend standing.

17 THE COURT: Assume that you don't. Assume that you
18 don't. How is it that you have next friend standing here?

19 MR. JAFFER: Well, there are two requirements, right?
20 One is that the next friend has to be dedicated to the best
21 interests of the real party at interest. I think that the
22 government hasn't spent a lot of time in its brief taking issue
23 with our plaintiff's concern, his earnest concern for his son's
24 well-being. It's really the second point that the government
25 argues with, and that's --

1 THE COURT: But the issue there is not just the
2 plaintiff's earnest concern, but whether it is the same, whether
3 there's an identity of interest with Anwar Al-Aulaqi.

4 MR. JAFFER: Well, Your Honor, there are two things I
5 would say to that.

6 THE COURT: It's a best interest type of issue, and
7 it's a similarity of interest, and I think it boils down to you
8 want sort of official public silence by Anwar Al-Aulaqi to work
9 in favor of the plaintiff here, and the government wants that
10 official narrow public silence on this suit, but a lot of
11 comments that are negative to the U.S. justice system, et
12 cetera, to work against you.

13 MR. JAFFER: Right.

14 THE COURT: Why shouldn't I look at that and conclude
15 that in light of the public statements that Anwar Al-Aulaqi has
16 made about not being bound by international law or the laws of
17 the civil state, why shouldn't I conclude that he has no desire
18 to bring this case? None whatsoever. What is it that should
19 lead me to believe that he desires to bring the case as opposed
20 to his father desiring to bring the case?

21 MR. JAFFER: Your Honor, some variant of silence is
22 present in every next friend case. The reason you have the next
23 friend before the court is because you don't have the real party
24 at interest available --

25 THE COURT: That's not necessarily true with death

1 penalty cases, but go ahead.

2 MR. JAFFER: Well, I guess that -- I mean you might be
3 right that that's an exception, but --

4 THE COURT: Parents are not permitted to bring
5 challenges where the individual subject to the death penalty has
6 decided not to challenge it.

7 MR. JAFFER: Well, right. I didn't mean to suggest
8 that, Your Honor. I just meant to say that -- I guess the only
9 thing that's important for my argument is that in many next
10 friend situations you have silence on the part of the real party
11 in interest, and the question is what to do with that silence.
12 So all I'm trying to say is it's not a unique situation.

13 Now, the government does point to something other than
14 silence on the part of Anwar Al-Aulaqi. And it's true, he said
15 many things and many statements have been attributed to him, and
16 some of those things are quite nasty and are quite negative
17 about the United States at least.

18 And the question for you, Your Honor, is not whether -- the
19 question isn't whether Anwar Al-Aulaqi has said negative things
20 about the United States. The question is whether he has
21 asserted some unwillingness or he has disavowed the lawsuit that
22 we've brought. And if you look at the cases that the government
23 relies on, they are all cases like that, in which the real party
24 in interest has either disavowed the suit or the real party in
25 interest had no relationship whatsoever to the litigant before

1 the court, and in some cases the litigant didn't even know the
2 names of the real parties in interest and asserted a next friend
3 standing. There are no cases in which --

4 THE COURT: But it's your burden, is it not, to show
5 that the plaintiff is acting in accordance with Anwar
6 Al-Aulaqi's best interests?

7 MR. JAFFER: As a general matter, yes, but it's not a
8 situation where every decision that's made in the context of the
9 case has to be consistent with the best interests. The whole
10 point of next friend standing is to put somebody in the shoes of
11 the plaintiff, because the real party in interest isn't
12 available to give us his or her desires with respect to the
13 litigation.

14 So it's our burden to show that our client is dedicated to
15 his son's best interest. And that in most circuits has been
16 considered a kind of per se or almost per se rule. I think we
17 cite one case, Vargas, from the Ninth Circuit, which says it is
18 a per se rule, that a father is dedicated to his son's best
19 interest.

20 So the question is whether the Court should reject what in
21 other contexts has been thought of as a per se rule. And the
22 government's justification here, the government's argument for
23 rejecting it is that our client's son has said many nasty things
24 about the United States.

25 THE COURT: Well, it's more than just nasty about the

1 United States. I think it reasonably can be taken as disavowing
2 any interest in using the U.S. court system to vindicate any
3 rights. He doesn't respect the U.S. court system. He doesn't
4 think it has any jurisdiction over a Muslim. How can one
5 conclude that he would believe that the U.S. court system should
6 be a vehicle for assessing his rights? How can one conclude
7 that based on his public statements?

8 MR. JAFFER: So, Your Honor, I think it's important to
9 distinguish between the statements that the government makes in
10 its brief about what Anwar Al-Aulaqi has said and what the
11 government says in its affidavits that Anwar Al-Aulaqi has said.
12 Because in its brief the government says that Anwar Al-Aulaqi
13 has expressed a desire to waive his constitutional rights, but
14 the paragraph to which they cite in the Clapper declaration
15 doesn't say that. It says something much narrower than that.

16 It says that Anwar Al-Aulaqi has -- I can't remember the
17 exact words, but essentially criticized the United States. And
18 I think the distinction between those two things is an important
19 one.

20 I don't think that we would have the right to be here if
21 Anwar Al-Aulaqi clearly disavowed the lawsuit, and we wouldn't
22 be asserting the right to be here. But in a situation where the
23 best representative of his interests is before the Court, and
24 the only statements that the government is pointing to -- and we
25 have no way of independently verifying these statements. We

1 have no way of telling which statements that have been
2 attributed to him are actually his statements and which ones
3 aren't. But even assuming that the ones that have been
4 attributed are his statements, we don't think that they go as
5 far as disavowing -- waiving his constitutional rights or
6 disavowing any interest in --

7 THE COURT: What about the question of access to the
8 courts, which is the other part of the government's argument?
9 Why can't Al-Aulaqi simply emerge from hiding and have full
10 access to the courts?

11 MR. JAFFER: Right. So Your Honor, I think there are
12 a couple of answers to that question. One is that insofar as
13 it's our obligation to show that there is some obstacle or some
14 hurdle --

15 THE COURT: It's more than some hindrance. That's
16 relevant to the third party standing. That's the test there.
17 It's more than that. It's a lack of access to the courts.

18 MR. JAFFER: You're right, Your Honor, under next
19 friend. But our argument is the same with respect to both of
20 those things. This is a situation where the real party in
21 interest is under a death threat. There is evidence in the
22 record that has not been -- that the government has not rejected
23 or opposed, that Anwar Al-Aulaqi has been in hiding because of
24 that death threat, or at least in part because of that death
25 threat. He's not been communicating even with his closest

1 family members.

2 And in that situation we think the real party in interest
3 is unable, within the meaning of the next friend cases, to
4 assert his own rights. And he certainly faces some hindrance.
5 All of those things together constitute some hindrance to his
6 ability to assert his rights.

7 Now, the government's argument, the one they spend a lot of
8 space on is the argument that Anwar Al-Aulaqi could turn himself
9 in, could surrender to the proper authorities. That's the
10 phrase that they use in their brief. But the prospect of
11 indefinite detention without charge or trial is itself a
12 hindrance that satisfies the Whitmore standard. And the
13 government has made clear, I think, in its brief that it asserts
14 the --

15 THE COURT: What cases say that?

16 MR. JAFFER: Sorry, I didn't hear the question.

17 THE COURT: What cases say that, that the prospect of
18 indefinite detention is sufficient to establish lack of access
19 to the courts for purposes of next friend standing?

20 MR. JAFFER: Well, we can't point to a case that says
21 that, Your Honor, but we can point to many cases in which
22 smaller hindrances have been found sufficient.

23 THE COURT: In the next friend context?

24 MR. JAFFER: Well, I was actually thinking of the
25 third party standing context.

1 THE COURT: We're in next friend right now, and I
2 think the bar is higher.

3 MR. JAFFER: You're right, Your Honor, the bar is
4 higher. But even if you look at a case like the one I mentioned
5 earlier, Coalition of Clergy, which actually didn't decide this
6 question but spends a lot of time on how impeded the detainees
7 held at Guantánamo were from asserting their own rights, I think
8 you can analogize the situation of the detainees in that
9 context. I'm not saying it's exactly the same, but you can --

10 THE COURT: Most of the cases that have dealt with the
11 detainees at Guantánamo have not allowed next friend standing.
12 Indeed, is there any case that has?

13 MR. JAFFER: I don't know the answer to that question,
14 Your Honor. But --

15 THE COURT: I think I do. But go ahead.

16 MR. JAFFER: Well, I'm not suggesting, Your Honor,
17 that detainees held -- I don't think it actually matters. The
18 point I'm trying to make is just that the court in Coalition of
19 Clergy, which is the one that has addressed this question at the
20 greatest length I think, in the context of the Guantánamo
21 detainees, did find that detainees held far away from the
22 United States in a relatively isolated environment, they
23 rejected the claim that the detainees were held incommunicado.

24 THE COURT: You can look at cases like the Padilla
25 case in the Supreme Court or the Hamdi case in the Fourth

1 Circuit and say next friend standing has been found. But in
2 both of those cases the reason is the holding by the government
3 of the individual incommunicado, no access to lawyers, no access
4 to relatives, et cetera. That's not the situation here.

5 MR. JAFFER: Well, Your Honor, it's not the situation
6 here, but it does bear some similarities. Unless you accept on
7 the merits -- I understand that the government's position on the
8 merits is that they have the right to do everything that they've
9 done thus far, right? But that's contested. It's contested
10 whether the government has the right to use the AUMF in the way
11 it's using it.

12 But if you accept our view that the AUMF is not justifiably
13 used in this way, then indefinite detention without charge or
14 trial is in fact a hindrance that -- not just a hindrance but
15 something that prevents our client's son from asserting his own
16 rights.

17 Now, from our perspective, it doesn't really matter whether
18 we have standing under next friend, on the next friend doctrine
19 or under the third party doctrine. As long as we have standing
20 under one.

21 THE COURT: I think you're right. If you have
22 standing under one, then you're home free. So you want to move
23 on to third party?

24 MR. JAFFER: Sure, Your Honor. So again, some of our
25 arguments are the same with respect to third party as they are

1 with respect to next friend. But I did want to point out a few
2 cases in which the courts have found relatively small hindrances
3 to be sufficient to meet the third party standing.

4 THE COURT: There are a lot of cases, and indeed, some
5 of the cases, including Supreme Court cases, seem to have paid
6 no attention to the hindrance issue at all.

7 MR. JAFFER: Right. I think it's a low bar.

8 THE COURT: It's either a low bar or no bar.

9 MR. JAFFER: Well, no bar is even better.

10 THE COURT: For you. Right. What about the injury in
11 fact issue, though? Isn't there a problem for you there, even
12 viewing it not as a cause of action but instead as a legally
13 protected interest or legally cognizable interest? Isn't there
14 a problem here? What is that for a father? What is the injury
15 in fact?

16 MR. JAFFER: Well, there are several different things
17 I'd point to. One is we think that he has an interest in his
18 relationship with his son, that a father --

19 THE COURT: The D.C. Circuit doesn't seem to have
20 bought that in Butera, and in the underlying Franz case.

21 MR. JAFFER: I think the government is overreading
22 those cases. Those cases are about whether there is a
23 constitutionally protected right that is invaded. And we're not
24 alleging that -- it doesn't matter to us whether it's
25 constitutionally protected.

1 THE COURT: But the cases also stand more for the
2 general proposition that when you're dealing with independent
3 adult children, there is no relationship that gives rise to some
4 legally protected or cognizable interest. I think that's what
5 the cases in general stand for, including those D.C. Circuit
6 cases. What case do you think goes the other way on that
7 question, when you have an independent, competent adult as the
8 child, as opposed to a minor?

9 MR. JAFFER: Your Honor, I don't think that even to
10 say that it has to be a legally protected interest is a fair --

11 THE COURT: Now we're going to go even below that, to
12 what?

13 MR. JAFFER: I'm going to use the language that you
14 did, Your Honor, in Yaman, and that the Supreme Court did in I
15 think Whitmore. It said --

16 THE COURT: Yaman is a case of minors, but go ahead.

17 MR. JAFFER: Right. But I'm just talking about the
18 test, though. The test was some sufficiently concrete interest
19 in dispute. That's the test. It's not a question of -- all of
20 this is prudential, right? Because the standing, the
21 constitutional standing --

22 THE COURT: This is not prudential. This is the
23 question of injury in fact. It is an Article III requirement.
24 It is not prudential.

25 MR. JAFFER: Well, Your Honor, the injury in fact I

1 think is provided by the real party in interest; that that real
2 party in interest has to have an injury in fact that meets
3 constitutional --

4 THE COURT: I don't think you're right. I think the
5 case law is that the injury in fact applies to the plaintiff.
6 The plaintiff has to show an injury in fact, which is an Article
7 III constitutional requirement. And then there are the
8 prudential requirements of hindrance, et cetera.

9 MR. JAFFER: I don't want to get -- I think I am
10 right, Your Honor, but I don't want to get distracted by it,
11 because I don't think anything turns on it. Because whether the
12 requirement is an injury in fact and whether it's a
13 constitutional requirement or not, we believe that we meet it,
14 because in our view our client has a legal interest or a legally
15 cognizable interest in his relationship with his son, and he has
16 a legally cognizable interest --

17 THE COURT: What case would you rely on for that
18 proposition? What's your best case? Butera is probably your
19 worst case, but there are others as well. What is your best
20 case?

21 MR. JAFFER: I don't know, Your Honor. I have to
22 think about that. But the cases I was going to cite to you
23 before you raised this very specific issue are cases like Yaman
24 and Craig v. Boren, Lepelletier v. FDIC, which are all cases in
25 which the real party in interest had claims, the litigant didn't

1 have independent claims at all. I'm just thinking through it
2 right now. I'm not sure that the mother in Yaman had any
3 protected interest at all. It's true, it's minor children.

4 THE COURT: The relationship gave rise to it. And
5 isn't one of the problems with this argument where it goes?
6 Because if there's a legally protected interest here, why isn't
7 there also a legally protected interest in the context where a
8 father would raise third party claims on behalf of an adult son
9 who was wrongfully incarcerated? Why isn't that also a context
10 where there would be third party standing? Or where the father
11 raised claims that a son was wrongfully terminated and so had to
12 go get a job on the other side of the country, far away from the
13 father?

14 Why aren't those situations that in your rationale would
15 lead to third party standing? Aren't we opening a very wide
16 door to the courts?

17 MR. JAFFER: No, we're not, Your Honor, because the
18 other requirements of third party standing would serve a
19 limiting function. You still need to show that there's some
20 hindrance to --

21 THE COURT: Why isn't being incarcerated -- you said a
22 moment ago that detention was a hindrance. Why isn't it a
23 hindrance here as well?

24 MR. JAFFER: Your Honor, I didn't mean to suggest that
25 detention was always a sufficient hindrance. In the Guantánamo

1 cases it turned --

2 THE COURT: Okay. Then how about a parent who is
3 suing on behalf of a child who's charged with a capital crime
4 and therefore is held in solitary lock-down? Is that a
5 sufficient hindrance so a parent can always bring that case
6 under third party standing? I doubt that.

7 MR. JAFFER: Well, I think it would be a much closer
8 case, because if you do have some hindrance, and you have a
9 close relationship between the parent and the son, so long as
10 the parent has some concrete interest, if the parent is --

11 THE COURT: But it's the relationship that gives rise
12 to the concrete interest in your view. The simple parent-child
13 relationship. Even though it's an adult child.

14 MR. JAFFER: I'm not sure that it's that alone. We've
15 alleged more than that in this case. We've alleged that -- I
16 think it's clear from the affidavit, I don't have it in front of
17 me, but it's clear from the affidavit that Dr. Al-Aulaqi filed
18 that a pre-existing relationship with his son has been
19 interfered with by the government's actions. I'm reading now
20 from paragraph 11. He says, "As Anwar's father I only want to
21 do what is in his best interest. I believe taking legal action
22 to stop the U.S. from killing him is in his best interest."

23 That ordinarily would not be an assertion that anyone would
24 question --

25 THE COURT: Why don't you just substitute in there,

1 instead of killing, locking him up for life?

2 MR. JAFFER: Your Honor, the government hasn't
3 actually --

4 THE COURT: Or locking him up for 10 years?

5 MR. JAFFER: The government hasn't filed an affidavit
6 in opposition here. There's no affidavit that says that
7 Dr. Al-Aulaqi is not asserting his son's best interest. There
8 are just no facts in the record on the other side. So I think
9 that procedurally this is an affidavit that the Court has to
10 accept as true. If the government wants to contest it, it can
11 file an affidavit saying that Dr. Al-Aulaqi is not representing
12 his son's best interest, or something along those lines. But I
13 don't think that the government has done anything sufficient in
14 this case.

15 THE COURT: And how do you deal with the parents of
16 death row inmates situation? Those parents are not permitted to
17 bring third party standing actions.

18 MR. JAFFER: Ordinarily, Your Honor -- I can't claim
19 this is a hypothetical I've thought through already, but
20 ordinarily I imagine that those prisoners are in a situation in
21 which they can get counsel themselves, and there is no real bar
22 to their filing -- to their asserting their own interest.

23 I think we're in a very different situation here. We've
24 got -- every newspaper in the world has reported that the
25 government, the U.S. government is trying to kill our client's

1 son. They have asserted in their own brief that they have the
2 authority under the AUMF to use all necessary and appropriate
3 force against leaders of AQAP. And they have asserted that our
4 client's son is a leader of AQAP. So this is not a situation
5 like the one that Your Honor's describing.

6 And again, Your Honor, if you look at the cases like
7 Lepelletier and Craig and Yaman, those are cases in which the
8 courts have -- I think that to the extent they're lower court
9 cases, they've applied this rule consistent with the Supreme
10 Court doctrine. But they are cases in which they have had a
11 very low bar, not only on the question of --

12 THE COURT: It's on the hindrance question.

13 MR. JAFFER: Not only on the question of hindrance,
14 but even on the question of when it comes to a family member
15 asserting rights that relate to their relationship with their
16 family member, the courts have usually accepted the family
17 member's assertions that they're acting in the best interest.
18 In fact, in Coalition of Clergy, the real question there was
19 whether these people had any relationship at all with the people
20 whose interests they claimed to be asserting.

21 Your Honor, I want to say just one more point about the
22 government's argument that he can avoid targeted killing by
23 surrendering himself to the appropriate authorities. Again, I
24 do think that the prospect of indefinite detention without
25 charge or trial, even if it doesn't meet the next friend hurdle,

1 certainly meets the third party standing hurdle.

2 THE COURT: In terms of hindrance.

3 MR. JAFFER: Yes, Your Honor. But I want to be clear
4 about one thing. We're not asserting that anyone has the right
5 to be a fugitive from the law. That's not the argument we're
6 making. But so far the government hasn't charged our client's
7 son with any crime. And I guess more to the point, the
8 government doesn't have the right to put fugitives to this
9 choice between turning themselves in and subjecting themselves
10 to the possibility of targeted killing.

11 So I want to say just a few points about state secrets.
12 First, Your Honor, I think that you need to look at this
13 question against the background of the government's statements
14 over the last few months. Government officials have spoken
15 quite freely to the press about the three categories of
16 information that they now say are protected. They've spoken
17 freely to the press about al-Qaeda, about AQAP and about
18 plaintiff's son. In other words, they've spoken about the very
19 information they say is now protected.

20 THE COURT: Certainly according to the press they
21 have.

22 MR. JAFFER: Well, some of the statements, not all of
23 them. Some of the statements are attributed to senior
24 government officials. So the information they're talking about
25 is apparently too sensitive for the courtroom, but it is not

1 necessarily too sensitive to the press. And I think that --

2 THE COURT: How is this case then any different than
3 the Jeppesen case in that regard? Isn't this the same
4 situation? And there the *en banc* Ninth Circuit, a closely
5 divided *en banc* case, although it isn't that the dissenting
6 judges were saying state secrets does not apply; they were just
7 saying let's wait and apply it later if it does apply.

8 But in that situation, the Court explained that the partial
9 disclosure of the existence and even some aspects of what was at
10 issue there, which was extraordinary rendition, doesn't preclude
11 the government asserting state secrets with respect to the
12 remaining facts with respect to the particular matter at issue,
13 because those would risk grave harm to the national security.

14 Why is this case any different than what the Ninth Circuit
15 had before it and what the Ninth Circuit said in that case
16 should also be said by me here?

17 MR. JAFFER: I think that the answer, Your Honor, is
18 different for standing than it is for the merits. So on
19 standing here, we can establish standing on the basis of
20 information --

21 THE COURT: Well, we're discussing neither standing
22 nor the merits. We're talking about state secrets right now.
23 That's what Jeppesen decided, and that's what I thought you were
24 discussing.

25 MR. JAFFER: I am, Your Honor, but the question is

1 what information is it that is covered by the state secrets
2 privilege? Is it information that the government thinks we need
3 for standing, or is it information the government thinks we need
4 for the merits, or is it something else altogether?

5 THE COURT: The proposition I'm drawing from Jeppesen
6 is that just because the government, through the press or
7 otherwise, has disclosed some facts, about extraordinary
8 rendition there, here targeted killing, that doesn't mean that
9 the government can't properly assert state secrets with respect
10 to the disclosure of other facts if they would risk grave harm
11 to the national security. That's what that case decided, and
12 why isn't that proposition just as true here?

13 MR. JAFFER: Your Honor, let me just finish what I was
14 trying to say earlier but not -- I didn't say it very well. I
15 think that that argument doesn't actually go to the information
16 we need for standing. For standing it's enough for us to
17 establish a credible threat of injury. You can analogize this
18 to a preenforcement challenge. This is like a preenforcement
19 challenge in which the government has said not only that it has
20 the authority to prosecute the plaintiff or people like the
21 plaintiff, but it has the authority to prosecute the plaintiff
22 specifically.

23 It's like that kind of preenforcement challenge. We don't
24 have to show with certainty that our client's son will actually
25 be killed or that the government -- even with certainty that the

1 government intends to kill him. We just have to show a credible
2 threat of injury. That's why I say that the relevance of the
3 state secrets doctrine to the standing inquiry is, well, not
4 even limited but is irrelevant to the standing inquiry. We're
5 relying only on information that's already in the public domain,
6 not just the news stories but more importantly the government's
7 own brief. Because it's in the government's brief that they
8 assert the authority to use the AUMF.

9 THE COURT: All right. I'll accept that for the
10 moment, that it's your position, and you may be right, that I
11 can decide standing either way based on the record before me,
12 without intruding on the state secrets privilege assertion by
13 the government. So I could decide standing, but can I go
14 further into the merits of the case, which is really where the
15 state secrets assertion would have its real meat.

16 Can I get into the merits of the case and do what you're
17 asking me to do in terms of the assessments and the rulings that
18 you're asking for, without getting into state secrets?

19 MR. JAFFER: You can, Your Honor. And in fact, I
20 would just point out that the government's invocation of the
21 privilege in this kind of context really is unprecedented.
22 There is no case out there in which the courts have accepted the
23 state secrets privilege where an individual's life or liberty
24 was at stake. There are cases like Jeppesen where it's a kind
25 of --

1 THE COURT: That's the same as the question I asked
2 with respect to political question. Where you're dealing with a
3 U.S. citizen, there's no case that you're aware of, and I don't
4 think the government has referred me to one yet, where either
5 political question, the political question doctrine or the state
6 secrets privilege has been accepted by the courts as a reason
7 not to reach the claims of a U.S. citizen that he is being
8 denied rights to life or liberty.

9 MR. JAFFER: I am not aware of any such case,
10 Your Honor. So that's an argument for rejecting --

11 THE COURT: But there's always a first time, isn't
12 there?

13 MR. JAFFER: Yeah, I hope it will not be in this case,
14 Your Honor. But --

15 THE COURT: Just because there isn't a case, why isn't
16 this the case that state secrets would properly apply in? It
17 seems to me that when you look at the kinds of issues in which
18 state secrets has been asserted, why is extraordinary rendition
19 a more appropriate context for state secrets than the military
20 targeting of someone that's at issue in this context? Why state
21 secrets in the former but not in the latter?

22 MR. JAFFER: Well, Your Honor, the appropriateness,
23 the sort of moral and ethical appropriateness of this
24 distinction is sort of beyond the parameters of this case. But
25 as a legal matter, as a purely legal matter, the courts

1 routinely draw distinctions between U.S. citizens and
2 noncitizens, routinely draw distinctions between damages cases
3 and cases involving life and liberty. And so I think there are
4 easy ways to draw distinctions between the cases in which state
5 secrets have been accepted --

6 THE COURT: What case says that the fact that a U.S.
7 citizen is involved, what case actually says that the fact that
8 a U.S. citizen's rights are involved means that the state
9 secrets privilege has less force? Any case say that?

10 MR. JAFFER: Your Honor, that's not the argument I'm
11 trying to make here. The argument I'm trying to make is in a
12 case involving the life or liberty of a U.S. citizen, there is
13 no court that has accepted invocation of state secrets --

14 THE COURT: I think you're right. Is there any court
15 that has said that in that context the state secrets privilege
16 has less force?

17 MR. JAFFER: I don't think that there's a case that
18 says it in those words, Your Honor --

19 THE COURT: Why, on the theories and the principles
20 that are relevant to state secrets, why should it have less
21 force?

22 MR. JAFFER: Well, Your Honor, the question is when
23 the government is --

24 THE COURT: State secrets isn't a balancing test. If
25 it were a balancing test and you looked at the force of the

1 rights involved and who held the rights, maybe you'd reach a
2 conclusion that state secrets would have less force. But it's
3 plain as day that state secrets is not subject to a balancing
4 test; it's absolute. So why should it have less force just
5 because a U.S. citizen is involved or just because life or
6 liberty is involved?

7 MR. JAFFER: Your Honor, you're right, it's not a
8 balancing test, but the courts have been very careful about what
9 consequences flow from accepting the state secrets invocation
10 when there are serious claims relating not just to life or
11 liberty, but individual liberties more generally. And if you
12 look at cases like In Re: Sealed Case or In Re: United States
13 where there are D.C. Circuit cases involving the state secrets
14 privilege, you see they very carefully go through -- they don't
15 address the question generally, are state secrets at issue in
16 this case.

17 They ask the question, well, what information is it that's
18 covered by the privilege, and what consequences flow from
19 withdrawing that specific information from the case, and is it
20 necessary to reach this question now or can we deal with it when
21 we come to a discovery request that asks for that kind of
22 information?

23 THE COURT: How would I, on your urging, resolve the
24 question with respect to whether AQAP is within the scope of the
25 AUMF and whether this particular individual is an operational

1 part of AQAP and therefore part of al-Qaeda? How would I
2 resolve that without looking at all the intelligence that the
3 United States possesses relevant to that issue? How could I do
4 it?

5 MR. JAFFER: Well, Your Honor, we have put evidence
6 before the Court on the issue of the association already, the
7 association between AQAP and al-Qaeda. We have submitted the --

8 THE COURT: But state secrets is just as relevant if
9 it bars a defense.

10 MR. JAFFER: Right.

11 THE COURT: How could I do it without assessing all
12 the intelligence that exists in the government's control?

13 MR. JAFFER: I think you would have to, you absolutely
14 would have to assess that intelligence, and it's intelligence --
15 it's the kind of intelligence that this court has already
16 assessed in the context of the Khan case, which involved the
17 association between HIG and the Taliban. It's the kind of
18 evidence that the D.C. Circuit looked at in Parhat, which
19 involved the alleged association between ETIM and the Taliban.

20 THE COURT: Those are after-the-fact assessments, not
21 assessments of the current evolving situation.

22 MR. JAFFER: Right. But if the question is how
23 sensitive is this information and is it too sensitive for a
24 court, then it doesn't really matter whether it's ex post or
25 ex ante. It's the same information. And Your Honor, I just

1 want to make one thing clear. Under any paradigm, the
2 government is going to retain the authority to use lethal force
3 against people who present an imminent threat to life or
4 physical safety, under any paradigm. Nobody is proposing that
5 the government shouldn't have that power or doesn't have that
6 power.

7 So the question of whether AQAP is associated with
8 al-Qaeda, that kind of question is relevant not to whether the
9 government has the authority to use lethal force, but whether it
10 has more authority than the authority I just spelled out. So
11 it's a limited question.

12 THE COURT: Mr. Jaffer, I think you've left your
13 colleague, Ms. Kebriaei, with only 20 seconds to do her
14 argument.

15 MR. JAFFER: I hope you will give her more than that.

16 THE COURT: So maybe we ought to turn to her.

17 MR. JAFFER: Okay. Thank you.

18 THE COURT: And I accept equal responsibility for
19 that.

20 MS. KEBRIAIEI: 20 seconds would be just fine,
21 Your Honor.

22 (Laughter)

23 THE COURT: Well, it won't be that bad.

24 MS. KEBRIAIEI: Good afternoon.

25 THE COURT: Good afternoon.

1 MS. KEBRIAIEI: I wanted to be in with just a few
2 points to frame our response to the government's political
3 question arguments, and then I can address any of Your Honor's
4 questions about political question or about the ATS claim.

5 To begin, the particular question, as my colleague said,
6 that plaintiff poses in this case, which is the starting inquiry
7 in a political question analysis, is whether the targeting for
8 death of a U.S. citizen outside the standards we've set forth
9 violates the Constitution's prohibition on the deprivation of
10 life without due process.

11 The inquiry doesn't stop there. But the government's
12 position that the political question doctrine bars the Court
13 from any role at all in adjudicating that question --

14 THE COURT: But if the question whether an
15 organization's alleged terrorist activity threatens the national
16 security of the United States is a nonjusticiable political
17 question, then why isn't this question also a nonjusticiable
18 political question? And of course, we know that the first
19 question is nonjusticiable under the D.C. Circuit's decision in
20 People's Mojahedin Organization of Iran, et cetera, et cetera.
21 One of those many cases with the same name.

22 MS. KEBRIAIEI: Your Honor, I think with respect to a
23 question of the deprivation of life or liberty without due
24 process, I don't see how the question of assessing the terrorist
25 allegations of a foreign organization are any different than

1 necessarily what the Court is doing in the habeas context. The
2 question of whether AQAP --

3 THE COURT: There political question has less force
4 because if you look at the Baker criteria and the first factor,
5 there is at least an argument that there's a specific reference
6 in the Constitution that puts that in the hands of the judiciary
7 through the suspension clause.

8 MS. KEBRIAIEI: That's right, Your Honor.

9 THE COURT: There isn't anything like that here, other
10 than the general Fourth and Fifth Amendment proposition.

11 MS. KEBRIAIEI: Which is not nothing.

12 THE COURT: It's not nothing. I agree with you.

13 MS. KEBRIAIEI: As the D.C. Circuit said and as
14 Your Honor said in Abu Ali, in the face of such fundamental
15 rights, the political question doctrine at least wanes, and I
16 think the fact that Your Honor pointed out, that the doctrine
17 has been accepted by the Supreme Court two times in 50 years,
18 says something about how the courts look upon it, especially
19 when questions of fundamental life and liberty are at stake.

20 THE COURT: But we don't know off the top of our heads
21 what the history of attempts to get certiorari, as Mr. Letter
22 gave his off-the-cuff assessment of it, but we don't know what's
23 been presented to the Supreme Court through petitions for
24 certiorari in cases where political question was denied or in
25 cases where political question was accepted. All we know is

1 that the Supreme Court has not had occasion to apply political
2 question, except in two instances where they did. Have there
3 been any cases in the last 50 years where the Supreme Court
4 rejected political question?

5 MS. KEBRIAIEI: Your Honor, I don't know the answer to
6 that question, but I think we can look at the question -- at the
7 cases where the government has presented the political question
8 doctrine or separation of powers concerns, for example in Hamdi,
9 in Rasul, in Boumediene, in the string of cases since 9/11, and
10 the courts have repeatedly rejected the proposition that when
11 core constitutional rights are at stake, particularly of a U.S.
12 citizen -- and those cases were in the context, for example,
13 Boumediene was in the context of noncitizens -- when those kinds
14 of questions are at stake, there can be no political question.

15 THE COURT: Well, you're drawing that proposition from
16 the cases. I think the cases also stand for the more limited
17 proposition that where it's habeas and there's a specific
18 constitutional reference to the judiciary, political question
19 doesn't prohibit the courts from reviewing detention in those
20 cases. Or if you move into the property cases, the D.C. Circuit
21 in particular has decided that in those cases the -- I think
22 there are two of them, one in Nicaragua and then the Ramirez
23 case, in those cases you're dealing with what the courts have
24 said is a pretty specific after-the-fact determination that the
25 courts are very used to making. So arguably, that can be

1 distinguished from this setting.

2 MS. KEBRIAIEI: Your Honor --

3 THE COURT: At least arguably.

4 MS. KEBRIAIEI: I accept what you're saying. I would
5 point, one, to, for example, Justice O'Connor's concern in Hamdi
6 about an unchecked system of detention, and a situation where
7 power was being consolidated within the executive branch, which
8 cuts completely against the idea of separation of powers. I
9 would also point, as Your Honor said, to cases like Ramirez and
10 the Nicaragua case, where the political question doctrine was
11 rejected, and those cases did not have to do with habeas, they
12 had to do with Fifth Amendment due process rights.

13 THE COURT: Other than in El-Shifa -- other than the
14 fact that this is a U.S. citizen, how do you distinguish
15 El-Shifa?

16 MS. KEBRIAIEI: I think the U.S. citizenship aspect is
17 key. El-Shifa was about a foreign target, a pharmaceutical
18 plant, not a human being, and an after-the-fact damages case, or
19 an after-the-fact defamation case that the circuit did not find
20 constituted a constitutional deprivation, the circuit court
21 opinion that the government relies upon. And the court
22 specifically distinguished, in responding to the plaintiff's
23 claims, that their inquiry was no different than habeas.

24 The court's concern seemed to be about the fact that there
25 was no constitutional deprivation of liberty at issue, and the

1 court also cited to cases like Bancoult, which did not address
2 the question, you know, we want to use the case for in our
3 position, but Bancoult cited to cases like Ramirez and the
4 Nicaragua case for the proposition that when you have
5 fundamental Fifth Amendment rights at issue, the political
6 question doctrine does not apply. And that's what the circuit
7 found in those cases.

8 THE COURT: Well, has the political question been
9 applied by the circuit in situations where constitutional rights
10 were at issue?

11 MS. KEBRIAIEI: Your Honor, I'm not aware of any off
12 the top of my head where the circuit court has found a situation
13 where you have an impending deprivation of life --

14 THE COURT: I didn't say life or liberty. I didn't
15 limit it that way. I've already asked that question of the
16 government and I don't think they came up with any case. But
17 I'm asking whether political question has been applied in
18 situations where the claims were constitutionally based, even if
19 not life or liberty claims.

20 MS. KEBRIAIEI: I can't respond to your question
21 directly. I know that when, in the Ramirez case and the
22 Nicaragua cases that had to do with Fifth Amendment nonliberty
23 situations, the political question doctrine was rejected, and
24 certainly -- which again is the case that we are talking about
25 here, when a deprivation of life or liberty is at stake, it

1 would be an extreme position, which is what the government is
2 taking, to deny any role at all. And that's what we're talking
3 about here.

4 THE COURT: What do you make of the Harbury case?

5 MS. KEBRIAIEI: Your Honor, I think, again, the
6 circumstances of this case are unique. We're talking about a
7 U.S. citizen with respect to his own government, facing an
8 impending deprivation of life without due process. And the
9 government here is asserting that the Court should have
10 absolutely no role in reviewing the government's claimed
11 authority. That's an extreme position, it's a terrifying
12 position, and it cuts against the jurisprudence of the Supreme
13 Court, the D.C. Circuit and this court.

14 THE COURT: What's the best case that you have for the
15 proposition that a court should get involved ex ante in setting
16 the standards for the executive branch to operate under in
17 military, intelligence and foreign affairs arenas, or that the
18 courts should be in a position to set those standards and then
19 enforce that through contempt or damages? What's the best case
20 that I should look to to support your position that that is
21 something that the Court should do?

22 MS. KEBRIAIEI: Your Honor, with respect to the context
23 at least that the government claims that we are in, which is
24 wartime, which we take issue with, and with respect to the
25 powers that are being asserted here, both under the AUMF and

1 presumably under Article II, and with respect to ex ante relief,
2 and in the context of what the President and the executive
3 branch assume to be, deem to be a dire immediate threat, I think
4 Youngstown is a strong case on point, where in the face of all
5 of those concerns and in circumstances that in many respects are
6 parallel to the one here, the Court did issue injunctive relief.

7 To the extent that there is no precise case on point, I
8 think again in many respects this case is unprecedented, and the
9 fact that there is no specific precedent on point should not
10 mean that the Court is incompetent to address the very legal and
11 constitutional issues that we've presented here.

12 THE COURT: There's some language in El-Shifa that is
13 troublesome, I think, for you, is there not, including the
14 language that, where the Court says, "If the political question
15 doctrine means anything in the arena of national security and
16 foreign relations, it means the courts cannot assess the merits
17 of the President's decision to launch an attack on a foreign
18 target, and plaintiffs ask us to do just that." How do you get
19 out from under that language?

20 MS. KEBRIAIEI: I think we get out from under it by
21 virtue of the U.S. citizen being the target here, and a
22 pharmaceutical plant in the Sudan being the target there. And
23 the Court made pretty clear that its analysis would have been
24 affected if there had been a constitutional issue at stake, and
25 certainly one relating to the deprivation of liberty, at least,

1 in citing the habeas cases.

2 Going back to the points I was starting with. With respect
3 to relief, which the government seems to focus on in their
4 reply, our position is the relief plaintiff seeks is not beyond
5 the competence of this court, and to the extent the government
6 argues that it is, their arguments are based on misconstruing
7 the relief that we're seeking and ignoring, as Your Honor
8 pointed out, the established experience of this court, in
9 particular this district court in particular, in dealing with
10 very complex and sensitive issues of national security in the
11 context of the Guantánamo litigation.

12 And as we've made clear, what we are asking the Court to do
13 is adjudicate the legal standard that would apply and issue an
14 injunction with respect to one individual. That would not bar
15 the Court --

16 THE COURT: You actually do ask for an injunction
17 that's broader than the one individual. You ask for an
18 injunction that would cover all U.S. citizens, and you even, I
19 think, ask for an injunction that would cover all targeted
20 killings. Are you narrowing that now and saying you're not
21 seeking that relief?

22 MS. KEBRIAIEI: Your Honor, I believe the injunction
23 that we are asking for is with respect to one person. The
24 predicate finding that Your Honor would need to make in order to
25 find the standard that we've set forth applies is broader, but

1 that is -- that's the declaratory part of the relief that we're
2 seeking, not the injunctive part.

3 THE COURT: There's not much difference between a
4 declaratory judgment and an injunction in that context.

5 MS. KEBRIAIEI: The President would not be subject to
6 contempt sanctions with respect to declaratory relief. And we
7 are talking again about not enjoining military operations, not
8 enjoining action, but setting the standard that should govern
9 that action. And that is squarely within the realm of the
10 Court.

11 And third, with respect to the context in which this
12 targeting would occur, the government in their reply argues that
13 that too is a question outside the competence of the Court.
14 What we're talking about there is simply what legal framework
15 would apply. What is the applicable law here? That question is
16 related to the question of armed conflict, but determining that
17 question is not one that courts have been incapable of
18 determining, contrary to the government's contention.

19 But more importantly, to the extent that the government
20 relies on the AUMF, as Your Honor said, that is simply a matter
21 of statutory interpretation, which is quintessentially a
22 judicial task, and one that courts have undertaken repeatedly
23 since 9/11.

24 THE COURT: We better talk a little bit about the
25 alien tort statute.

1 MS. KEBRIAEEI: Okay. I can respond to Your Honor's
2 questions --

3 THE COURT: Let's start with this question. Is there
4 any case that recognizes a cause of action to prevent a
5 threatened future extrajudicial killing?

6 MS. KEBRIAEEI: Your Honor, again, there is no specific
7 case on point here --

8 THE COURT: Then that seems to me to be a problem,
9 because Sosa says you look to what is established under
10 customary international law norms. And if there is no such
11 case, how can you possibly say that you meet that high bar under
12 Sosa?

13 MS. KEBRIAEEI: Your Honor, I want to be clear that the
14 claim plaintiff is bringing is based on one of the most
15 established international norms that exist. It's a claim based
16 on the prohibition of extrajudicial killing. He is bringing the
17 claim in his own name for the injury --

18 THE COURT: He's bringing it in his own name, for what
19 injury?

20 MS. KEBRIAEEI: For the harm that he would suffer by
21 virtue of the death of his son.

22 THE COURT: What kind of harm is that?

23 MS. KEBRIAEEI: That is emotional distress, which the
24 government --

25 THE COURT: So has any court recognized that kind of

1 emotional distress cause of action so that we would reach this
2 high bar under Sosa of a customary international law norm?

3 MS. KEBRIAIEI: Your Honor --

4 THE COURT: There's dispute within the United States
5 courts as to whether you can have that kind of intentional
6 infliction of emotional distress when the plaintiff is not even
7 present.

8 MS. KEBRIAIEI: The claim that we're bringing I think
9 is analogous to a wrongful death claim, where a claimant can
10 bring an action for the wrongful death of another individual,
11 for harm that that claimant herself has suffered. That is the
12 analogy here. It doesn't change the nature of the claim itself,
13 which is --

14 THE COURT: I have to say I've become a little
15 confused. Maybe you're clarifying it now. It did seem to me
16 that you started out purporting to bring the alien tort statute
17 claim in the plaintiff's own right, to prevent an injury that he
18 would suffer. But then in your reply brief you disavowed, I
19 thought very clearly, any reliance on intentional infliction of
20 emotional distress, loss of consortium or any other tort that a
21 parent might suffer as the result of a child's unlawful killing.
22 That would include wrongful death, too.

23 But now you're going back to your initial position of
24 saying no, no, no, this isn't a third party standing situation;
25 this is a direct injury to the plaintiff. I do feel that you've

1 led me up and around here.

2 MS. KEBRIAIEI: Well, we apologize for that. We were
3 trying to be as clear as possible. Our intention was not at all
4 to take the focus away from the fact that what we are talking
5 about here is a claim for extrajudicial killing. The nature of
6 the damages --

7 THE COURT: No, no, the threat of extrajudicial
8 killing.

9 MS. KEBRIAIEI: Yes. Excuse me. A threat of --

10 THE COURT: Extrajudicial killing you have a little
11 stronger footing for a customary international law norm by
12 virtue of the TVPA if nothing else.

13 MS. KEBRIAIEI: That's right. In fact, EJK claims are,
14 that's one of two torts that are recognized under the TVPA.
15 Extrajudicial killing claims are long established, the cogent
16 norm. But the claim we are bringing is on that basis. It's on
17 the basis of that international norm that is very well
18 recognized. It's recognized under Sosa. It's recognized under
19 statutes of the United States.

20 THE COURT: Not for the threat of an extrajudicial
21 killing, for a future extrajudicial killing. There's no such
22 recognition.

23 MS. KEBRIAIEI: To the extent we're talking about the
24 injunctive relief here, there have been two cases at least that
25 have recognized that injunctive relief is at least possible in

1 the ATS context. Regardless of the fact that the circumstances
2 of those cases differed, or the issue that the government takes
3 with --

4 THE COURT: Right now I'm not into sovereign immunity.
5 I'm into cause of action. I just don't see under Sosa how you
6 can satisfy that high bar. The Supreme Court has instructed
7 that courts should be very cautious about creating new torts in
8 this context. How in the world does this one satisfy the
9 Supreme Court's requirement for a customary international law
10 norm when no court has ever recognized it?

11 MS. KEBRIAIEI: Your Honor, because the customary
12 international law norm is no different than what has long been
13 recognized.

14 THE COURT: Oh, it's no different to say a threat of a
15 future extrajudicial killing versus an actual extrajudicial
16 killing? I think I would have to disagree with you and say that
17 there is a difference.

18 MS. KEBRIAIEI: I think that the difference is -- my
19 understanding of it is the difference is the nature of the
20 relief that we are seeking.

21 THE COURT: The difference is in the nature of the
22 injury. The injury is an emotional type of injury. That's what
23 hasn't been recognized as a cause of action.

24 MS. KEBRIAIEI: But the claim, the tort that would be
25 occurring, that would be resulting in the injury to plaintiff

1 would be a violation of the norm of extrajudicial killing. That
2 is the basis of the claim. It's no different than wrongful
3 death actions where plaintiffs bring a claim based on the
4 wrongful death itself, but the injury is of a different nature.
5 And that is what we're talking about here.

6 And again, to the extent that we're talking about the
7 injunctive piece of the claim, again, injunctive relief has been
8 recognized in the context of ATS.

9 THE COURT: Before we get to the injunctive relief and
10 the sovereign immunity, and it's the same kind of concern I
11 expressed with Mr. Jaffer in a slightly different context, but
12 it seems to me that the kind of cause of action that you're
13 saying rises to the level of a customary international law norm
14 would open a very wide door, because it would mean that suits by
15 lots of people fearing some contemplated government action could
16 be brought under the ATS, where there's been no recognition of
17 such suits in any legal environment, international or domestic.

18 MS. KEBRIAIEI: I think if the threatened harm -- the
19 threatened harm were one that had been recognized to the extent
20 that extrajudicial killing has been recognized in customary
21 international law, those claims might be possible. And again,
22 that is the claim that we are talking about. There would be no
23 injury to plaintiff but for that potential killing.

24 THE COURT: All right. So let's go to sovereign
25 immunity for a second. We've got Sanchez-Espinoza and we've got

1 the D.C. Circuit saying this waiver of sovereign immunity under
2 the APA might arguably be available, and we can discuss that,
3 but that in any event it would be an abuse of discretion to
4 apply that and provide discretionary relief against the
5 United States, where you're talking about sensitive foreign
6 affairs matters, and the statutes that you're talking about are
7 no more specific than the alien tort statute and the APA, which
8 is exactly what we're dealing with here.

9 How do I get around -- how do you get around or lead me
10 around that language from Sanchez-Espinoza? And I hope you're
11 not going to say, well, this is a U.S. citizen.

12 MS. KEBRIA EI: Well, I do think the facts of this
13 case --

14 THE COURT: Well, you're not going to say that in the
15 alien tort statute context, because a U.S. citizen can't bring
16 such a case.

17 MS. KEBRIA EI: Well, that's right, but I do think that
18 in evaluating, in deciding whether to award equitable relief and
19 making decisions about discretion, those decisions should be
20 made in light of the particular facts of the case. And the
21 facts of the case of the Sanchez-Espinoza decision were
22 radically different. Those had to do with alleged harm that was
23 being alleged by a nonresident, noncitizens, with respect to
24 injury that they were suffering by virtue of the U.S.'s actions
25 in another state.

1 We're talking here about the United States with respect to
2 a U.S. citizen, and again a deprivation of life. And the
3 deprivations in Sanchez-Espinoza were severe, but I think again,
4 when we're talking about the facts at issue here, Sanchez can be
5 distinguished.

6 THE COURT: We sort of wind up with no rules at all if
7 the way rules are set is just look and see how serious the
8 claims are, and if the claims are serious enough, then forget
9 about any of the constraints on bringing cases, either
10 jurisdiction or standing or any of these other propositions. I
11 understand the instinct that leads one in that direction, but it
12 does lead to sort of an unprincipled landscape where you just
13 sort of look and see, oh, this is a serious enough claim,
14 therefore forget about the rules relating to standing or forget
15 about the rules relating to sovereign immunity or to cause of
16 action, and proceed.

17 MS. KEBRIAEI: Well, Your Honor, to the extent we're
18 talking about discretion, Your Honor's discretion, I think
19 concerns about the burden -- about the unique circumstances of
20 the case, the burden to the government, the parties involved,
21 all of those things are factors that the Court would take into
22 consideration. And again, when you consider Sanchez-Espinoza,
23 the relief that was being sought there was also much broader
24 than what we're seeking here.

25 THE COURT: Let's turn to the point that I asked

1 Mr. Letter about. Is there any case that you're aware of that
2 has allowed a claim under the alien tort statute against the
3 United States or its officials for nonmonetary relief?

4 MS. KEBRIAEEI: Your Honor, one moment, please. I'm
5 sorry.

6 (Counsel conferring.)

7 MS. KEBRIAEEI: Your Honor, that didn't help me much.

8 (Laughter)

9 We're not aware of any, no.

10 THE COURT: The only case I'm aware of is the Rosner
11 case in the Southern District of Florida, which might fit in
12 that category, but the problem with that case in terms of
13 whether it fits in that category is that it very much based its
14 decision on the fact that the conduct complained of, even though
15 it might be exercised by military personnel, was really
16 nonmilitary activity, and that's not what we have here.

17 MS. KEBRIAEEI: Well, I think that --

18 THE COURT: So I've given you the opening. Now you're
19 going to run it, right?

20 MS. KEBRIAEEI: Well, you say nonmilitary. I think the
21 context in which we're operating is relevant, and it's in
22 dispute. And the government certainly assumes the conclusion of
23 the appropriate context and the appropriate legal framework, and
24 again, those are issues that we disagree with.

25 THE COURT: Now, you also contend that the

1 Larson-Dugan exception applies here. If that's your position,
2 how do you get around the D.C. Circuit's decision in
3 Sanchez-Espinoza that says in this context, the kind of context
4 that we have here, Larson-Dugan doesn't apply at all?

5 MS. KEBRIAIEI: Well, Your Honor, I think that with
6 respect to the Larson-Dugan exception we have a second pillar of
7 our argument, which is that the APA waiver does apply here with
8 respect to at least Defendant Panetta and Gates, if it does not
9 apply to the President. So under the APA's waiver, sovereign
10 immunity would be addressed, even if we put aside concerns about
11 Larson-Dugan. And the government does not dispute that --

12 THE COURT: But nonetheless, we're not aware of any
13 case under the alien tort statute that proceeded with even
14 nondamages relief against officials of the United States?

15 MS. KEBRIAIEI: We're not, Your Honor. But again, with
16 respect to sovereign immunity and whether it would be waived
17 under the APA with respect to two of our three defendants, the
18 government does not dispute that the APA waiver would apply to
19 Defendants Panetta and Gates, and they turn then to an argument
20 about discretion, equitable discretion, but that is not about
21 sovereign immunity. So to the extent -- with respect to
22 sovereign immunity, we do believe the APA waiver applies with
23 respect to the majority of the defendants.

24 THE COURT: All right. I'm going to let Mr. Letter
25 have the lectern unless you have something you want to say in

1 conclusion.

2 MS. KEBRIAIEI: Thank you, Your Honor.

3 THE COURT: And I'm going to give each side a chance
4 to say some final words. Obviously, they should be directed to
5 what the other side has argued most recently.

6 MR. LETTER: Thank you. If it's okay with you, I
7 would like to direct an answer to something that you asked,
8 though. You asked about political question and constitutional
9 claims. The most obvious one is -- and talk about core
10 constitutional claims, it's again the Walter Nixon case. He
11 said he was being impeached improperly under the Constitution.
12 He cited a direct provision in the Constitution about whether
13 he's entitled to the Senate sitting as a jury, and the Supreme
14 Court -- I was going to say unanimously but I'm not positive --
15 said it was a political question.

16 In addition, Your Honor --

17 THE COURT: Well, you have the two Supreme Court cases
18 of Gilligan and Walter Nixon. Are they both constitutional
19 cases?

20 MR. LETTER: Yes.

21 THE COURT: But neither involves life or liberty.

22 MR. LETTER: Correct. Correct. The one other thing I
23 wanted to point out, though, is you were asking Ms. Kebriaei
24 about El-Shifa. Remember, the federal circuit decision in
25 El-Shifa, which the D.C. Circuit cited and heavily relied on,

1 there one of the arguments we made was that because the
2 plaintiff was not a U.S. citizen, couldn't bring the claim there
3 for just compensation, the constitutional claim, the federal
4 circuit declined that argument, and instead it treated it as if
5 it was a citizen because some old claims court precedent that --

6 THE COURT: The actual decision in the federal circuit
7 is of what relevance here?

8 MR. LETTER: It held that it is a political question.
9 Ms. Kebriaei responded to you that, well, El-Shifa didn't
10 involve a U.S. citizen. What I'm pointing out is that the
11 federal circuit decision said it's a political --

12 THE COURT: Assuming that.

13 MR. LETTER: Exactly. That the right was there.
14 Couple of points that my friends here and supervisors have
15 pointed out to me.

16 THE COURT: Uh-oh. This means you're not taking
17 credit or responsibility for any of it.

18 (Laughter)

19 Sounds to me like you're running far away from these.

20 MR. LETTER: No. These are all really good points.

21 (Laughter)

22 First, you asked me if there are any cases where the Court
23 said it's not a political question but still denied relief,
24 equitable discretion, and the answer is yes, Sanchez-Espinoza,
25 770 F.2d at, I think it was 208. The court there specifically

1 addressed that, said it wasn't a political question, but
2 nevertheless said no relief because of the equitable discretion
3 doctrine.

4 Then the -- oh. You had asked me about the differences
5 between the case here and the Guantánamo cases. I think I
6 hinted a little bit about this but didn't say it nearly as
7 clearly as I should have. As you well know, in those cases
8 you're not determining threat, that is not something that
9 factors into your considering as you're making the habeas
10 determination. You're determining whether the person was
11 properly captured and detained. And we don't come to you and
12 argue that whether they were or weren't, they're a threat.

13 And that obviously is a key aspect of this case. So it's
14 another way that this is -- what you would be asked to examine
15 here is very different from what you're asked to examine in the
16 detainee cases.

17 THE COURT: Even accepting what you say, how does that
18 make a real difference in terms of what the Court is engaged in
19 doing?

20 MR. LETTER: Because the important thing that you
21 would have to do in order to rule on this case, one of the
22 various things, you would have to determine is the President
23 properly weighing the imminence of the threat posed by
24 Al-Aulaqi. And that's not something that you ever have to do in
25 the Guantánamo detainee habeas context. You don't get into that

1 ever.

2 THE COURT: So you think that -- you don't think that
3 the courts, in looking at whether someone is a part of al-Qaeda,
4 are in part at least assessing how significant a part and how
5 significant a threat that involvement in al-Qaeda constituted,
6 because it's looking in the past rather than the future or the
7 present.

8 MR. LETTER: Yeah. I think that you do, yes, you do
9 get into how significant a part they were. I believe that you
10 do get into that, but the question of current threat, you don't.

11 THE COURT: Current threat, certainly not.

12 MR. LETTER: And that, you would absolutely have to do
13 here. You and the President, if you issued an injunction, you
14 and the President would have to talk to each other.

15 THE COURT: Well, let's stop for a second. Is it
16 really true that in those cases -- and I don't want to dwell too
17 long on those cases, we could spend the rest of the day -- but
18 in those cases, that the courts are not looking at the threat?
19 I mean, there are fairly recent cases from the D.C. Circuit
20 where a part of the analysis really is whether someone,
21 notwithstanding earlier involvement, withdrew that involvement
22 and whether, based on that withdrawal, there really is a
23 continuing threat or involvement. Why is that so different?

24 MR. LETTER: Your Honor, my understanding of that
25 specific case that you're referencing is it was a question of

1 had he withdrawn from al-Qaeda by the time he was captured. I
2 don't think that there was any discussion about whether he is
3 currently a threat.

4 THE COURT: Well, you know, most of those detainees
5 over the last eight years have not been too actively involved in
6 al-Qaeda.

7 MR. LETTER: That's exactly right. Then this next
8 point ties in with this, which is if somebody's at large, then
9 obviously the evidence can be constantly shifting and changing,
10 and so that is something that again the President and his
11 advisors -- and if plaintiffs are correct, you would be sitting
12 in with them, trying to figure out and sort all of this
13 evidence, and you would need to be available I think 24 hours a
14 day so that you could do that.

15 THE COURT: Then it's clear what way I'm going to
16 decide based on that.

17 (Laughter)

18 MR. LETTER: You had asked about the question about
19 can it be a political question even when there is a specific
20 statutory claim. And El-Shifa mentioned that, but also I'm
21 reminded that the second Kissinger case in the D.C. Circuit,
22 Gonzalez-Vera, the Court specifically held that even if there is
23 a statutory claim -- there it was a TVPA -- you can have a
24 political question.

25 Then -- my friend Mr. Jaffer was making the point that the

1 U.S. government should not put somebody to this choice of coming
2 forward, presenting himself, and thereby avoiding the threat of
3 lethal force. But our point exactly is that this is within the
4 control of the real party in interest here. It's totally within
5 the control of Al-Aulaqi whether he is going to be under the
6 threat of force or not. He can avoid that by presenting
7 himself.

8 One point that really struck me was that, this question
9 about, well, maybe we don't want an injunction, we could have a
10 declaratory judgment or something, we would be seeking damages
11 later. If what plaintiff is really interested in is the
12 possibility that if his son is subject to lethal force he be
13 able to bring a damages action later, we don't need this
14 lawsuit. If he wants to bring a damage action later, he can
15 file that action. It might or might not be justiciable, but we
16 don't need a suit here today for an ex ante declaratory judgment
17 or injunction so that plaintiff can later bring a damages action
18 should he be able to do so.

19 THE COURT: Seems to me that he's also arguing that he
20 would like to keep his son alive.

21 MR. LETTER: Well, of course, except, remember, this
22 also is I think one of the more bizarre aspects of this case.
23 Remember that the plaintiff is saying we can kill his son. He's
24 saying we can do it --

25 THE COURT: Under the right set of criteria.

1 MR. LETTER: Exactly. Exactly. And that goes to this
2 whole question about is he litigating in the best interests of
3 his son. That does raise a very odd inquiry, it seems to me.

4 On Youngstown, remember, there they -- two differences.
5 One is the Youngstown situation itself fit within what Justice
6 Jackson's concurring opinion later said is the third category,
7 which is when the President is acting solely on his own
8 authority inconsistently with Congress, because Congress had
9 passed the Taft-Hartley Act, and President Truman was not
10 following it. Here, as we have said, the President is acting at
11 the apex of his authority. In addition, Youngstown did not
12 involve --

13 THE COURT: The apex? When it's totally reserved to
14 the President?

15 MR. LETTER: Well, here, remember, the President is
16 acting as commander in chief and with the power given him under
17 the AUMF. So it is both political branches --

18 THE COURT: But that means it's not totally reserved
19 to the President.

20 MR. LETTER: That's right. Remember, if I'm getting
21 the three-part test that Justice Jackson set out, or three
22 different situations, the apex is when the President has his own
23 authority, and --

24 THE COURT: Congress has it.

25 MR. LETTER: Precisely. And in addition, Youngstown

1 did not involve a specific situation where the question was
2 would lethal force be used in a particular situation. It was
3 obviously a much broader issue that was primarily domestic. And
4 so that's really quite different.

5 And then the last two points I wanted to make, this would
6 go to the declaratory judgment point. That still really is no
7 good from the government's perspective, because the President
8 obviously wishes to know, if there's a declaratory judgment out
9 there, is he acting contrary to what the Court has ordered? And
10 so this would put the President in an extremely awkward
11 position, if there's either an injunction or a declaratory
12 judgment, and the President has to be thinking in terms of can
13 I, should I order this use of lethal force. I might not be able
14 to convince Judge Bates that it was appropriate or
15 inappropriate. So that's the problem with the declaratory
16 judgment hanging over his head.

17 And then the last point is that, also going to the very
18 strangeness of this suit, we have a situation here where
19 Al-Aulaqi is urging people to die in an effort to kill
20 Americans, and yet -- and at the same time is repudiating the
21 power of the U.S. courts, and yet his father is here trying to
22 use the U.S. courts in a way that would allow Al-Aulaqi to
23 continue acting as a leader of an organization that is actively
24 engaged in trying to kill Americans.

25 THE COURT: Might or might not, depending upon whether

1 the United States is actually applying criteria along the lines
2 of what the plaintiff is suggesting are required.

3 MR. LETTER: That is true, Your Honor. I have nothing
4 further, Your Honor.

5 THE COURT: All right.

6 MR. LETTER: Thank you very much.

7 THE COURT: For the plaintiff, whoever wants to get
8 up. Only one of you.

9 MR. JAFFER: Your Honor, can I have five minutes? Is
10 that too much to ask?

11 THE COURT: Let's see where you go.

12 MR. JAFFER: All right. A few points that I'll make
13 very quickly. So you asked, Your Honor, on third party standing
14 what the interest is. And I just want to articulate the
15 interest as clearly as I can and then move on. One is that the
16 actions of the United States with respect to Anwar Al-Aulaqi
17 already prevent our client from speaking to his son, from
18 meeting with his son; they threaten to prevent him ever from
19 seeing or meeting with his son, because obviously the threat is
20 to kill him. And as Your Honor mentioned at one point --

21 THE COURT: That's an interest that it's disruptive of
22 the parent-child communication as part of that relationship.

23 MR. JAFFER: That's right, Your Honor. And then the
24 other thing is in some jurisdictions -- and if anything turns on
25 this, we'd be happy to research which jurisdictions, but in some

1 jurisdictions our clients would have a legally recognized right
2 to bring, for example, a wrongful death action if his son were
3 killed. So that too I think is a recognition of an interest
4 that our client has in his son's life. So that's the interest
5 that we're arguing is sufficient for third party standing.

6 THE COURT: In some U.S. jurisdictions, you're saying
7 it's your belief that he would have a legally recognized right
8 to bring a wrongful death action without anything further
9 happening? Wrongful death action is really brought on behalf of
10 the estate by an appointment, generally.

11 MR. JAFFER: Right. Actually, I was relying on
12 Your Honor's hypothetical, which I recognize was a hypothetical.
13 I don't know the answer to this question, whether our client
14 would have the ability to bring a direct action on his own
15 behalf in the case of his son's death.

16 THE COURT: Seems to me the Butera case in the D.C.
17 Circuit raises some doubt whether he would have that right in
18 this jurisdiction.

19 MR. JAFFER: Your Honor, I don't want to -- I'm not
20 sure it matters whether this jurisdiction recognizes his right,
21 because he's not asserting the right. He's not asserting --
22 this isn't a wrongful death action and he's not asserting rights
23 with respect to his son's wrongful death. It's just a way of
24 saying that the interest that a parent has in the life of his
25 adult child is recognized by the law in some places, and that is

1 in our view sufficient to support the injury requirement of
2 third party standing.

3 And as to the floodgates concern Your Honor raised earlier,
4 I just want to reiterate that the other two requirements do some
5 work, the close relationship requirement and the some hindrance
6 requirement.

7 THE COURT: But my floodgates concern was premised on
8 a close relationship, and in the two situations I raised, it
9 seems to me there would be some hindrance, which is a lower bar
10 than a complete denial of access to the courts, hindrance either
11 from some serious form of incarceration, or -- and I'm sure you
12 would make the argument that it was a hindrance -- or even in an
13 employment situation, from the result being that a child was
14 sent 3,000 miles across the country to find work.

15 MR. JAFFER: Yeah. Your Honor, on this --

16 THE COURT: I know a lot of parents who tell their
17 children they can't even apply to colleges on the other side of
18 the country.

19 MR. JAFFER: Right. But Your Honor, I don't think
20 it's true that detention is in itself some hindrance. I think
21 it would depend on the context. And I don't think that that in
22 itself presents a floodgates problem. But I feel like I've
23 given you my best answer to this question.

24 On Gilligan, which neither I nor my co-counsel addressed,
25 but Mr. Letter brought up, very quickly, Your Honor, we think

1 that the government's reliance on that case is misplaced. As
2 Your Honor pointed out, the Court expressly distinguishes
3 between what it called a broad call on judicial power to assume
4 supervision over the National Guard. It expressly distinguished
5 that kind of case from an action seeking a restraining order
6 against, quote, "some specified and imminently threatened
7 unlawful action." And that's exactly the kind of case we're
8 bringing here.

9 The other thing to note about Gilligan, Your Honor, is that
10 that was a case in which the plaintiffs didn't allege that the
11 government was applying rules that were unlawful. Everybody
12 agreed that the rules that the government had adopted were
13 lawful. The only question was whether the Court would
14 continually supervise the government's compliance with rules
15 that everybody agreed were the right rules to remain in place.
16 And that's not the situation we have here. Obviously there's a
17 dispute about which rules actually apply.

18 Your Honor also asked about whether there is precedent for
19 the Court's imposing ex ante rules on the executive branch in
20 wartime. And I think my co-counsel pointed out Youngstown, but
21 the other thing to say about that is that the question assumes a
22 conclusion that we dispute. This isn't in our view a wartime --

23 THE COURT: I don't think I used the term "wartime."

24 MR. JAFFER: I think Mr. Letter used some version of
25 wartime. But I just wanted to point the Court to three cases in

1 which the courts actually did impose those kinds of rules
2 outside wartime. One is National Treasury Employees Union. The
3 cite is 918 F.2d 968. That's a case in which the D.C. Circuit
4 enjoined a federal agency from drug testing its employees
5 without reasonable suspicion. It was before the fact, an
6 ex ante rule.

7 Another is a Ninth Circuit case called LaDuke, 762 F.2d
8 1318. The Ninth Circuit enjoined the INS from conducting
9 suspicionless searches of farm dwellings except in exigent
10 circumstances. And that actually sort of maps onto the kind of
11 rule we're proposing here.

12 The last one is another D.C. Circuit case called Tatum v.
13 Morton, 562 F.2d 1279. The D.C. Circuit enjoined the District
14 of Columbia from conducting strip searches on parking and
15 traffic arrestees without probable cause to suspect hidden
16 weapons.

17 A couple very quick points on state secrets.

18 THE COURT: You think those cases help you in
19 responding to the concern raised by Mr. Letter that no court has
20 ever imposed such restrictions on the President and the senior
21 officials of the United States in the context of military,
22 foreign or intelligence affairs?

23 MR. JAFFER: Your Honor, I think that this is true
24 throughout the government's arguments, that it mistakes the
25 chicken for the egg. The question here is whether we are --

1 THE COURT: Which comes first?

2 MR. JAFFER: Well, I just think the question is
3 whether we are in the military context or the wartime context or
4 the battlefield context. That is the question that's in
5 dispute.

6 But even if we were in that context, there are cases in
7 which the courts order senior government officials to act in
8 particular ways during wartime. Youngstown was one, but all the
9 Guantánamo cases are cases like that too, in which the courts
10 order the government to release prisoners who are held by the
11 executive branch. And in some cases those are prisoners that
12 the government has argued are dangerous terrorists. So it
13 wouldn't be unprecedented at all.

14 THE COURT: And it's where the authority of the
15 United States derives from the AUMF, which is to some extent a
16 wartime provision.

17 MR. JAFFER: Right, Your Honor. On state secrets,
18 just a few points, very quickly. One is Your Honor asked about
19 why it is that this circumstance is different, sort of -- why is
20 it that in the context of cases involving life and liberty the
21 courts haven't accepted the state secrets doctrine.

22 I just want to point you to a passage in Reynolds in which
23 the Supreme Court discusses precisely that question. And what
24 the Court says is -- now I'm paraphrasing, except for the word
25 "unconscionable" which actually is in the decision. It would be

1 unconscionable to allow state power to be brought to bear on an
2 individual, but then to allow the state to prevent that
3 individual from having access to information or to defend
4 himself.

5 That is precisely what is going on here. If the government
6 were to charge Anwar Al-Aulaqi with a capital offense, it
7 wouldn't be able to rely on the state secrets privilege in the
8 context of the prosecution. Here what the government is doing
9 is essentially imposing the death penalty without trial, but
10 relying on a privilege that wouldn't be available to it even
11 with trial.

12 The other point on state secrets, Your Honor, is that I
13 think it's clear, but I think it's worth underscoring, that not
14 everything within the three categories that the government has
15 identified is actually a secret. For one thing, we wouldn't be
16 in court today were it not for the government's disclosures to
17 national newspapers that our client had been -- our client's son
18 had been targeted under this program.

19 The second is in court today the government has reiterated
20 something in its brief, which is that if Anwar Al-Aulaqi were to
21 come forward, the government wouldn't target him in that
22 context. And that does disclose something about their targeting
23 criteria.

24 The other thing, Your Honor, is their brief discloses
25 something about their targeting criteria because it discloses

1 that they draw authority for the use of necessary and
2 appropriate force against people like Anwar Al-Aulaqi from the
3 AUMF. So they've disclosed several different things about the
4 authority at issue here.

5 THE COURT: It seems to me that can cut either way.
6 The government could say, see, this is really hard to litigate
7 this case without disclosing sensitive information that, if not
8 state secrets, borders on state secrets. And that's why the
9 Court should not get into it. You've only put your toe in the
10 water, Judge, and already the plaintiffs are saying that the
11 government is disclosing things that are within the category
12 that it is claiming are subject to state secrets. Imagine when
13 you dive in completely, Judge. State secrets are going to be
14 disclosed left and right if we try to litigate this case.

15 MR. JAFFER: Your Honor, if they were to detain Anwar
16 Al-Aulaqi, then tomorrow Anwar Al-Aulaqi's lawyers would be in
17 court contesting or challenging the detention, and the
18 government would be required to disclose the very --

19 THE COURT: Maybe, maybe not. But they could be.
20 They could be.

21 MR. JAFFER: I think, if the Guantánamo cases are any
22 guide, the government would be required to disclose the very
23 information that it is now saying it can't disclose. So I think
24 from our --

25 THE COURT: Required under what?

1 MR. JAFFER: I think if there were an allegation in
2 the context of a habeas case that --

3 THE COURT: That would only be true if they took him
4 to Guantánamo. It wouldn't be true if they took him somewhere
5 else outside the United States.

6 MR. JAFFER: I think it would, Your Honor, because
7 he's a U.S. citizen. I think that there's no question that a
8 U.S. citizen, even held at Guantánamo --

9 THE COURT: Perhaps you're right. You may be right.

10 MR. JAFFER: So, Your Honor, two final points. On
11 that one, it's just, the way we see it is the government is
12 using secrecy opportunistically. That it discloses information
13 when it is useful to the case, and withholds it when it
14 undermines its own legal arguments. And I don't mean to suggest
15 bad faith on the part of the government, but I do think that if
16 you look at the information that's been disclosed, it's
17 precisely the information that the government says is -- it is
18 information that is within the categories the government says
19 are protected by the state secrets privilege.

20 Last point.

21 THE COURT: Last point is right.

22 MR. JAFFER: Last point. I just wanted to step back
23 from the weeds once more and point out the consequence of
24 accepting the government's arguments here. If Your Honor
25 accepts the government's arguments, then the President will have

1 the unreviewable authority to order the assassination of any
2 American whom he labels an enemy of the state, and there will be
3 no judicial review ex ante, and there will be no judicial review
4 ex post. And even the legal framework under which the
5 government uses legal force will be for the President alone to
6 decide. And that is something --

7 THE COURT: Do you think it's that broad, that it's
8 the power to assassinate any United States citizen?

9 MR. JAFFER: In this sense, Your Honor. The question
10 of whether an American falls within the category of people who
11 can be assassinated is a question that the President alone will
12 decide. I am again not suggesting that the current president is
13 acting in bad faith, that there has been a decision to -- that
14 the President is using the AUMF in a way that the President
15 understands is beyond the scope of what Congress authorized.

16 But I think there are larger institutional and separation
17 of powers concerns here. And if you invest in the presidency
18 the authority to decide which Americans should be killed and
19 which -- or which Americans should be killed, and you leave it
20 to the President, both ex ante to make that decision, and
21 ex post to decide whether it was the right decision, then you've
22 done something that is inconsistent with the Fourth and Fifth
23 Amendments, and I think inconsistent with the principle of
24 separation of powers.

25 THE COURT: All right. Thank you, Mr. Jaffer.

1 MR. JAFFER: Thank you, Your Honor.

2 THE COURT: Mr. Letter, do you want to respond to the
3 last point? There's a concern that's raised by Mr. Jaffer, that
4 to go with the government here and say that this suit for one
5 reason or another cannot proceed, is effectively to give carte
6 blanche to the President to assassinate any United States
7 citizen without judicial scrutiny ever being available.

8 MR. LETTER: That is incorrect, Your Honor. In our
9 reply brief we address this specifically, because Mr. Jaffer and
10 Ms. Kebriaei made this, as I recall, the opening sentence of
11 their reply. We are making a far more limited argument. We are
12 saying this is a -- well, obviously the next friend and third
13 party standing, those arguments are valid no matter what. But
14 as far as things like the justiciability and political question
15 argument, we have made them --

16 THE COURT: And state secrets.

17 MR. LETTER: Exactly. All of those are arguments that
18 depend on the specific situation that confronts the Court, and
19 that's why -- you used the word "ad hoc" and I said that's
20 right. The political question doctrine is often very much
21 ad hoc, and the state secrets doctrine, whether something is to
22 be dismissed under state secrets, is absolutely ad hoc. It
23 depends entirely on the specific situation that is involved.

24 So here, just to tick off a couple of them. We have said
25 this involves a situation where -- claims of targeting, but when

1 there is a congressional authorization over -- use of force
2 overseas by the President as part of the President's commander
3 in chief authority to conduct military and related intelligence
4 gathering, et cetera, operations against somebody who is -- and
5 as we know here, there's been no refutation of this in any of
6 their papers -- somebody who's been formally and officially
7 designated as a specially designated global terrorist because of
8 his operational leadership of an organization that has also been
9 designated as terrorist, that is attempting to carry out
10 operations continually in order to kill Americans.

11 So we've made our justiciability arguments, again except
12 for next friend, et cetera, in this quite narrow context. I
13 think it's -- I'm going to use the word it's ridiculous to say
14 that our argument leads to the conclusion that the President can
15 assassinate anybody he wants and there's no judicial -- nothing
16 that the judiciary can do about that. That's just absurd.

17 THE COURT: All right. Thank you all for the lengthy
18 arguments and the lengthy briefs as well. And I will consider
19 all of them as expeditiously as I can, and will decide, to begin
20 with, the issues presented in the government's motion to
21 dismiss. If I decide to deny that motion, then you will hear
22 from me about further proceedings. If I decide for one reason
23 or another to grant that motion, then you will receive that
24 decision and probably there will be no further proceedings.

25 But I will try to get a decision out as quickly as I can,

1 but don't look for it in a matter of days. I think it's going
2 to take a little bit longer than that. But thank you again for
3 the quality of the arguments.

4 (Proceedings adjourned at 4:54 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

BRYAN A. WAYNE