App. 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 2020 Decided January 15, 2021

No. 19-5328

BILAL ABDUL KAREEM,
APPELLANT

v.

GINA CHERI HASPEL, DIRECTOR OF THE
CENTRAL INTELLIGENCE AGENCY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00581)

Tara J. Plochocki argued the cause for appellant. With her on the briefs were *Eric L. Lewis* and *Jeffrey D. Robinson*.

Joseph Margulies was on the brief for *amici curiae* Former State and Federal Prosecutors in support of appellant.

Santha Sonenberg was on the brief for *amicus curiae* Russian Expert Professor William Bowring in support of appellant.

Hyland Hunt and *Ruthanne M Deutsch* were on the brief for *amici curiae* Victims and Families of

Victims of State-Sponsored Violence in Northern Ireland in support of appellant.

A. Richard Ellis was on the brief for *amicus curiae* Professor Brenner Fissell in support of appellant.

Bradley Hinshelwood, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief was *H. Thomas Bryon, III*, Attorney.

Before: SRINIVASAN, *Chief Judge*, HENDERSON and MILLETT, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge:* Plaintiff Bilal Abdul Kareem is a United States citizen who works in Syria as a journalist. Because five aerial bombings allegedly occurred in Kareem's vicinity in Syria during the summer of 2016, Kareem claims that he has mistakenly been placed on a purported list of individuals the United States has determined are terrorists who may be targeted and killed. Kareem seeks a declaration that his alleged inclusion on the purported list is unconstitutional and an injunction barring the United States government from including him on the purported list without providing additional procedural protections. The district court, after concluding that Kareem had established standing sufficient to survive a motion to dismiss and that some of Kareem's claims were justiciable, dismissed the complaint pursuant to the application of the state secrets privilege. The critical question before us is whether Kareem has

Article III standing to seek prospective relief as, without Kareem's standing, we lack jurisdiction to consider the other issues raised in his appeal. The complaint fails to allege plausibly that any of the five aerial bombings were attributable to the United States and specifically targeted Kareem. Accordingly, his standing theory does not cross the line from conceivable to plausible. Thus, we vacate the district court's dismissal and remand with instructions to dismiss the complaint on the ground that Kareem lacks Article III standing.

I. BACKGROUND

A. Facts

Kareem works as a journalist in Syria for On the Ground Network (OGN), a news organization that provides "access to the views of the anti-Assad rebels." Compl. at ¶ 45, *Kareem v. Haspel*, 412 F. Supp. 3d 52 (D.D.C. 2019) (No. 17-cv-581), ECF No. 1. Kareem's complaint alleges that he "posts interviews with rebel fighters on social media outlets" and "is one of the only Western journalists in the region given access to these individuals to interview them." *Id.*

The complaint further alleges that, while performing his work as a journalist in Syria in 2016, Kareem "narrowly missed being hit by military strikes" five different times. *Id.* at ¶ 46. Four of the alleged strikes occurred in June 2016. First, in Idlib City, after Kareem "heard aircraft approaching," an airstrike hit OGN's office building. *Id.* at ¶ 47. Second, after Kareem heard "drones buzzing above," a strike hit an area near

Aleppo where Kareem and his cameraman had recently finished conducting an interview. *Id.* at ¶ 48. Third, "[t]he vehicle of Kareem and his staff was struck and destroyed by a drone-launched Hellfire missile." *Id.* at ¶ 49. At the time of the third strike, Kareem was sitting in a different, nearby vehicle which was "hurled into the air by the force of the blast" and "flipped upside down." *Id.* Fourth, a "missile" again hit OGN's office building in Idlib City. *Id.* at ¶ 50. Fifth, in August 2016, in an "area [that] had recently changed hands from [Syrian] government control to rebel hands," Kareem and his co-workers were in his car "when there was a huge blast only yards away from the car." *Id.* at ¶ 51.

As a result of the five near-miss experiences in a three-month period, Kareem alleges "[u]pon information and belief' that he "was the specific target" of each of the strikes and that his name is included on a list of targets for U.S. military action.[1] *Id.* at ¶ 52. According to the complaint, the United States has publicly disclosed that it "conducts lethal strikes targeted at individuals, using remotely piloted aircraft, among other weapons, and that targets are selected . . . as a result of a 'process' in which targets are nominated by one or more defendants." *Id.* at ¶ 55. On May 22, 2013, then-President Barack Obama issued a document that outlined a process for designating individuals as terrorist targets approved for lethal action (Presidential

[1] Kareem refers to the U.S. government's alleged list of terrorist targets approved for lethal action as the "Kill List." *Id.* at ¶ 1.

Policy Guidance). *Zaidan v. Trump*, 317 F. Supp. 3d 8, 15 (D.D.C. 2018) (citing Compl. at ¶ 57).[2] According to the complaint, the Presidential Policy Guidance includes guidance on the "necessary preconditions for taking lethal action" and on the designation of individuals as targets based only on "metadata" collected from electronic devices (*i.e.*, without knowing the target's identity). *Id.* (citing Compl. at ¶¶ 61, 63).

Because of Kareem's proximity to the five aerial bombings described in the complaint, Kareem alleges that his name is on a list of individuals the United States has determined are terrorists and may be targeted and killed. *See Kareem v. Haspel*, 412 F. Supp. 3d 52, 55 (D.D.C. 2019). Kareem alleges that he was never notified of his inclusion on the list nor provided an opportunity to challenge his inclusion.

B. Procedure

In March 2017, Kareem filed suit against the Central Intelligence Agency (CIA), the Department of Defense (DOD), the Department of Homeland Security (DHS), the Department of Justice (DOJ) and the United States, as well as the CIA Director, the DOD and DHS Secretaries, the Attorney General, the

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[2] *See also* Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download. On August 6, 2016, a redacted version of the Presidential Policy Guidance was declassified and made public. *Zaidan*, 317 F. Supp. 3d at 15.

National Security Advisor and the Director of National Intelligence (DNI), all in their official capacities.[3] The complaint alleges that Kareem's purported inclusion on a list of terrorist targets approved for lethal force violated the Administrative Procedure Act, 5 U.S.C. §§ 701–706. It asserts six claims:

- Count 1: Inclusion of Kareem on the Kill List was arbitrary, capricious and an abuse of discretion.
- Count 2: Inclusion of Kareem on the Kill List was not in accordance with law.
- Count 3: Inclusion of Kareem on the Kill List exceeded the defendants' statutory authority.
- Count 4: Inclusion of Kareem on the Kill List violated due process because Kareem was not provided notice nor given an opportunity to challenge his inclusion.
- Count 5: Inclusion of Kareem on the Kill List violated the First Amendment because it "has the effect of restricting and inhibiting [his] exercise of free speech and [his] ability to function as [a]

[3] Kareem filed suit with a co-plaintiff, Ahmad Muaffaq Zaidan. The two sued President Trump in addition to the other defendants but the district court dismissed those claims because the President is not an agency subject to the Administrative Procedure Act. *Zaidan*, 317 F. Supp. 3d at 22; *see Franklin v. Massachusetts*, 505 U.S. 788,796, 800–801 (1992). The district court also dismissed Zaidan's claims for lack of standing, *Zaidan*, 317 F. Supp. 3d at 18–19, and he did not appeal. Accordingly, Kareem is the sole remaining plaintiff.

journalist[] entitled to freedom of the press." Compl. at ¶ 85.

- Count 6: Inclusion of Kareem on the Kill List violated the Fourth and Fifth Amendments because it constituted an illegal seizure and sought to "deprive [Kareem] of life without due process of law." *Id.* at ¶ 91.

Kareem seeks (1) a declaration that his inclusion on the terrorist target list is unlawful and/or unconstitutional, (2) an injunction barring the defendants from including him on the terrorist target list without providing additional procedural protections and (3) an injunction requiring the defendants to remove him from the terrorist target list and/or stop targeting him for lethal action.

On June 5, 2017, the defendants moved to dismiss, arguing that Kareem lacked standing and that his claims presented non-justiciable political questions. On June 13, 2018, the district court granted in part and denied in part the motion to dismiss. *See Zaidan*, 317 F. Supp. 3d at 13. Specifically, the district court concluded that (i) Kareem had plausibly alleged standing sufficient to survive a motion to dismiss, *id.* at 19–21; (ii) Counts 1, 2 and 3 were non justiciable under the political question doctrine, *id.* at 25–26; and (iii) Counts 4, 5 and 6 were justiciable under the political question doctrine, *id.* at 26–29.

As relevant here, the district court found that "[a]ccepting all well-pled allegations as true, Mr.

Kareem has plausibly alleged that he was in 2016 a target on the Kill List with evidence that makes it 'more than a sheer possibility.'" *Id.* at 20 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The district court reached its conclusion on the basis that Kareem "alleges that the United States engages in targeted drone strikes, that he has been the near victim of a military strike on five occasions (at least one of which included the use of a drone), and that he is a journalist who is often in contact with rebel or terrorist organizations." *Id.* (footnote omitted). The district court acknowledged that "[d]efendants set forth other plausible alternatives, such as the fact that Mr. Kareem could have been targeted by Syria for reporting on anti-Assad efforts," but concluded that "their argument does not make it implausible that the attacks were a result of U.S. action." *Id.*

After the district court's resolution of the motion to dismiss, the parties discussed potential pre-trial resolution. *Kareem*, 412 F. Supp. 3d at 55. "Despite two months of discussions, the parties were unable to resolve the litigation." *Id.* At that point, Kareem asked to begin discovery and the defendants informed the district court that they were considering a second motion to dismiss based on the state secrets privilege.

On January 30, 2019, the defendants filed a motion to dismiss pursuant to the state secrets privilege. *Id.* at 56. They submitted public affidavits from then-Acting Secretary of Defense Patrick Shanahan and then-DNI Daniel Coats, addressing the invocation of the state secrets privilege. The defendants also

submitted classified declarations from the same officials that provided the district court, *in camera*, with additional information relevant to the assertion of the privilege.

On September 24, 2019, the district court dismissed the complaint pursuant to the state secrets privilege. *Id.* at 62. First, it found that the defendants satisfied the three procedural requirements for invoking the state secrets privilege.[4] *Id.* at 56–57. Second, the district court determined that "the state secrets privilege bars disclosure of the requested information to Mr. Kareem because disclosure would present a reasonable danger to national security." *Id.* at 61.[5] Third,

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[4] Specifically, (i) the privilege was asserted by the United States government; (ii) the claim of privilege was made through formal declarations by the heads of the agencies responsible for the information; and (iii) the agency heads personally reviewed the relevant information and determined that invoking the state secrets privilege was warranted. *Id.* at 56–57.

[5] Kareem had sought discovery on three topics: (1) whether the United States has targeted Kareem for lethal force and, if so, on what basis; (2) the process the United States used to target Kareem and what process would be used in the event he remains a target; and (3) whether the United States targeted Kareem in the airstrikes alleged in the complaint. *Id.* at 57–58. Upon reviewing the public and classified declarations, the district court found that "disclosure of [the privileged] information . . . and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." *Id.* at 58 (alteration in original) (quoting *Al-Haramain Islamic Found, Inc. v. Bush*, 507 F.3d 1190,1204 (9th Cir. 2007)). It noted that disclosure could (1) "hinder the United States' military operations in Syria"; (2) pose a threat to intelligence sources and methods; and (3) result in an

the district court concluded that application of the state secrets privilege required dismissal of Kareem's complaint because "there is no feasible way to litigate [the United States'] alleged liability without creating an unjustifiable risk of divulging state secrets." *Id.* (alteration in original) (quoting *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 (9th Cir. 2010)).

Kareem timely appealed the district court's dismissal. On appeal, Kareem argues that the Shanahan and Coats declarations do not justify non-disclosure of the requested information; and even if they do, the state secrets privilege cannot foreclose Kareem's exercise of his Fifth Amendment right to due process. The defendants defend the district court's conclusion that the state secrets privilege required dismissal. They also reassert their arguments (1) that the complaint's allegations are insufficient to establish standing and (2) that Kareem's claims present non justiciable political questions.

II. ANALYSIS

We review *de novo* a district court's determination that a plaintiff has standing. *See Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Here, the complaint fails to allege a sufficient factual basis to create a plausible inference that the described missile attacks were attributable to the United States and specifically targeted Kareem. Accordingly, Kareem

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individual's altering his activities or otherwise evading detection or capture based on the disclosed information. *Id.*

has failed to establish standing and we vacate and remand for dismissal on that basis.[6]

Article III limits the jurisdiction of federal courts to "Cases" or "Controversies." *See* U.S. Const. art. III, § 2, cl. 1. As the United States Supreme Court has made clear, one "essential and unchanging part of the case-or-controversy requirement" is that a plaintiff must establish Article III standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff establishes Article III standing by showing that he seeks relief from an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). Because Kareem's complaint "seeks prospective declaratory and injunctive relief, he must establish an ongoing or future injury that is 'certainly impending'; he may not rest on past injury." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (quoting *Clapper*, 568 U.S. at 409). Importantly, the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," particularly "in the fields of intelligence

[6] Because we determine that Kareem has not established standing, we do not reach the applicability of the political question doctrine or the state secrets privilege to this case.

gathering and foreign affairs." *Clapper*, 568 U.S. at 408–09 (internal quotations omitted).

Because standing is a threshold jurisdictional requirement, it may be questioned at any time during the litigation. "[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, L *e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Consequently, at the motion to dismiss stage, we "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor," *Arpaio*, 797 F.3d at 19, but "[t]hreadbare recitals of the elements of [standing], supported by mere conclusory statements, do not suffice," *id.* (alteration in original) (quoting *Iqbal*, 556 U.S. at 678). We do not assume the truth of legal conclusions, *Iqbal*, 556 U.S. at 678, nor do we "accept inferences that are unsupported by the facts set out in the complaint," *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007). Accordingly, '"[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [of standing] that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In this respect, "the plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

The complaint alleges upon information and belief that the U.S. government has designated Kareem as a terrorist target approved for lethal force. We have

recognized that "pleadings on information and belief are permitted when 'the necessary information lies within defendants' control.'" *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (quoting *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 645 (3d Cir. 1989)). In such circumstances, however, we also require that the allegations based on information and belief "be accompanied by a statement of the facts upon which the allegations are based." *Id.*; *see also Tooley v. Napolitano*, 586 F.3d 1006, 1007–1008, 1010 (D.C. Cir. 2009) (dismissing complaint where alleged facts did not plausibly support inference that government had surveilled plaintiff, despite plaintiff's allegation "on information and belief' that at least nine telephones connected to him had been illegally wiretapped). Accordingly, whether Kareem has alleged sufficient facts to establish standing turns on whether the complaint's allegations create a plausible inference that the U.S. government has designated Kareem as a terrorist target approved for lethal force.

Kareem argues that the complaint's allegations regarding his proximity to five missile strikes over a three-month period in Syria in 2016 make it plausible that the U.S. government has targeted him for lethal force. The defendants, on the other hand, argue that Kareem lacks standing because no facts plausibly establish (1) that the five missile strikes were attributable to the United States or (2) that the five missile strikes specifically targeted Kareem. We agree with the defendants. Kareem's allegation that the United States has targeted him for lethal action "stops short

of the line between possibility and plausibility." *Twombly*, 550 U.S. at 557.

Kareem does not and could not plausibly dispute the basic facts that, in the summer of 2016, the Syrian civil war involved numerous factions, including pro-Assad government forces, anti-Assad opposition groups, Kurdish factions, the Islamic State (ISIS) and al-Qaeda-linked fighters. *See* Cong. Rsch. Serv., RL33487, *Armed Conflict in Syria: Overview and U.S. Response* 9–11 (June 20, 2017).[7] In addition, foreign governments, including Russia, Iran, Turkey and the United

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[7] It is well-settled that we may consider materials outside the pleadings to determine our jurisdiction. *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987) (court may "undertake an independent investigation to assure itself of its own subject matter jurisdiction" in considering standing under Rule 12(b)(1)). In so doing at the motion to dismiss stage, we "must still 'accept all of the factual allegations in [the] complaint as true.' " *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253–1254 (D.C. Cir. 2005) (alteration in original) (quoting *United States v. Gaubert*, 499 U.S. 315, 327 (1991)). We may also take judicial notice of " 'a fact that is not subject to reasonable dispute' if it either 'is generally known within the trial court's territorial jurisdiction' or 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' " *Hurd v. District of Columbia*, 864 F.3d 671, 686 (D.C. Cir. 2017) (quoting Fed. R. Evid. 201(b)). We take judicial notice of facts regarding the Syrian conflict that Kareem's complaint does not dispute because they are generally known and can be readily determined from reliable sources, such as the Congressional Research Service and State Department reports. *See Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016) (taking judicial notice of agency report); *Youkhana v. Gonzales*, 460 F.3d 927, 932 (7th Cir. 2006) (taking judicial notice of State Department country report on Iraq).

States, were providing direct military assistance to different factions at the time. *Id.* at 11.

Nor is there any dispute that Idlib City and Aleppo, the areas where Kareem alleges the five airstrikes occurred, were major battlefields in the Syrian conflict during the summer of 2016. Specifically, Idlib City, the site of OGN's office and of two of the alleged airstrikes, was captured by anti-Assad forces with the support of al-Qaeda-linked fighters in 2015. *Id.* Hostilities between the Syrian government and opposition forces continued in the area throughout 2016.

Similarly, Aleppo, Syria's then-most populous city, was the center of intense battles throughout the summer of 2016. The Syrian government cut off access to opposition-held eastern Aleppo in July 2016, only for al-Qaeda linked fighters to retake territory in the southwest of the city and create an access point to besieged eastern Aleppo in August 2016. *See* Carla E. Humud et al., Cong. Rsch. Serv., RL33487, *Armed Conflict in Syria: Overview and U.S. Response* 8 (Sept. 28, 2016). Then, in September 2016, "Syrian and Russian forces began an intense aerial bombardment of opposition-held areas of eastern Aleppo." *Id.* at 8–9.

Unquestionably, numerous actors were involved in the Syrian conflict in the specific areas identified in Kareem's complaint during the specific time period the alleged airstrikes occurred. And the complaint does not contain any factual allegations that explicitly link the United States to any of the five alleged airstrikes. In attempting to link the United States to the five

airstrikes, the complaint instead relies primarily on the assertion that "[d]efendants have admitted that the United States conducts lethal strikes targeted at individuals, using remotely piloted aircraft, among other weapons." Compl. at ¶ 55. A general allegation that the United States targets individuals using drones is plainly insufficient to establish plausibly that, in a war-torn area of Syria in the summer of 2016, the United States was responsible for five airstrikes in Kareem's vicinity and that Kareem was the specific target of those airstrikes.

As for specific allegations, the complaint's description of the third airstrike comes the closest to alleging U.S. involvement. It claims that an OGN vehicle "was struck and destroyed by a drone-launched Hellfire missile." *Id.* at ¶ 49. Although not alleged in the complaint, Kareem's appellate brief asserts that a Hellfire missile is "the missile attached to most armed U.S. drones." Appellant Br. 9. The defendants respond that the Hellfire missile system "is employed by numerous U.S. allies." Appellees Br. 16. The parties provide no support for their respective assertions.

Even assuming *arguendo* that the United States was the only actor in Syria using Hellfire missiles in 2016, Kareem's allegation nonetheless suffers from two fatal flaws: (1) we cannot give the allegation material weight because Kareem has apparently retreated from the assertion in this litigation and (2) it provides no plausible inference that Kareem was the specific target of the airstrike. First, the complaint alleges that the third airstrike involved "a drone-launched Hellfire

missile." But Kareem's appellate briefing undermines that factual assertion. Kareem's opening brief categorizes this airstrike as coming "in the form of *what appeared to be* a Hellfire missile." Appellant Br. 9 (emphasis added). And Kareem's reply brief explains that Kareem "*believed* [the third alleged airstrike] was a Hellfire missile of the type used by the United States because of its strength and the damage it caused." Reply Br. 10. At oral argument, Kareem's counsel conceded the impossibility of knowing "with any kind of certainty . . . that it was a Hellfire missile" at this stage of the litigation. Tr. of Oral Arg. at 5:1–4, *Kareem v. Haspel* (No. 19-5328) (Nov. 16, 2020).[8] Thus, the allegation that the third airstrike involved a Hellfire missile is nothing more than a conclusory assertion made on an equivocal factual basis and is therefore afforded little, if any, weight in the plausibility analysis. *See Iqbal*, 556 U.S. at 679 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

Moreover, were we to construe Kareem's conclusory Hellfire missile allegation as a factual inference based on the damage from the blast, the further necessary inference that the missile was attributable to the United States would still be unreasonable. The United States was not the only actor using powerful missiles in Syria in 2016. Indeed, Syrian and Russian

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[8] *See also* Reply Br. 10 ("It is unclear how any person could positively identify who launched a missile while it is being fired at him, or the type of missile launched.").

forces carried out "an intense aerial bombardment of opposition-held areas of eastern Aleppo" in 2016. *See* Carla E. Humud et al., Cong. Rsch. Serv., RL33487, *Armed Conflict in Syria: Overview and U.S. Response* 8 (Sept. 28, 2016). Specifically, U.S. and European officials "accused Russia of using bunker-buster bombs and incendiary munitions against civilians in Aleppo." *Id.* at 9 (footnote omitted). Bunker-buster bombs are "munitions dropped from aircraft that are designed to penetrate hardened targets or targets buried deep underground. Such munitions are usually characterized by relatively large explosive charges, specially reinforced detonating mechanisms, an[d] precision guidance systems in order to maximize the probability of destroying particularly difficult targets." *Id* at 9 n.18. Accordingly, the unsupported Hellfire missile allegation does not provide a plausible basis to infer that the United States launched the missile described in the third alleged airstrike.

Second, Kareem's factual allegations are insufficient to establish a plausible inference that the "drone-launched Hellfire missile" targeted *him*, even assuming *arguendo* the United States launched the missile. As noted, the area surrounding Aleppo, where the airstrike is alleged to have occurred, experienced intense battles between the Syrian government (and its allies) and opposition forces during the summer of 2016. The complaint contains no allegation that the airstrike that struck an OGN vehicle on June 26, 2016 was the only missile to hit the area that day. And Kareem was not the only person in the vicinity of the airstrike.

OGN staff were present and the missile struck the OGN vehicle, not the pickup truck in which Kareem was sitting. Accordingly, the inference that the alleged "drone-launched Hellfire missile" specifically targeted Kareem is an unreasonable inference.

The other four alleged airstrikes suffer from the same fatal defect—the absence of any plausible inference that they *specifically* targeted Kareem. They either targeted OGN's office building or hit areas where Kareem was accompanied by other people. *See* Compl. at ¶ 47 ("strike hit the OGN building"); ¶ 48 ("Kareem was with his cameraman. . . . [and] a local man who owned a supermarket"); ¶ 50 ("OGN [office] was targeted"); ¶ 51 ("Kareem and three other people from OGN were driving in Kareem's car" when a blast occurred nearby). And there is no allegation that they were the only people in the area when the airstrikes occurred. Simply put, the necessary inference that at least one of the alleged airstrikes was (1) attributable to the United States and (2) specifically targeted Kareem is implausible on the face of the complaint's allegations.

Moreover, Kareem's factual allegations are "not only compatible with, but indeed [are] more likely explained by" attacks carried out by pro-Syrian government actors. *Iqbal*, 556 U.S. at 680. First, Kareem is part of a news organization dedicated to providing access to the views of anti-Syrian government rebels. Second, two of the alleged airstrikes hit the news organization's offices. And third, one of the airstrikes occurred in an area that had recently shifted from Syrian

government control to rebel hands. In its *Syria 2016 Human Rights Report*, the United States Department of State noted that the Syrian government has used "indiscriminate and deadly force against civilians," including through "air and ground-based military assaults." U.S. Dep't of State, *Syria 2016 Human Rights Report* 2 (2017). And the United Nations Commission of Inquiry on Syria has reported that the Syrian government "routinely targeted and killed both local and foreign journalists."[9] *Id.* at 29. These facts do not eliminate the *possibility* that the five airstrikes alleged in the complaint were attributable to the United States and specifically targeted Kareem. But they do make the necessary inferences *implausible.* To conclude otherwise would indicate that any person who uses an electronic device, is in the vicinity of multiple explosions in a war zone and has had some contact with local militants can plausibly allege that the United States has targeted him for lethal force. Article III of the United States Constitution precludes such a result. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976). Here, "[t]he complaint . . . simply do[es] 'not permit the court to infer more than the mere possibility of misconduct,' and this is insufficient to show that" Kareem has the requisite

[9] Specifically, according to the State Department, Reporters Without Borders has estimated that 56 journalists were killed in Syria between 2011 and September 2016, including seven during 2016. *Id.*

standing. *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 688 (D.C. Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679).

For the foregoing reasons, we vacate the district court's dismissal pursuant to the state secrets privilege and remand with instructions to dismiss the complaint on the ground that Kareem lacks Article III standing.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5328 **September Term, 2020**
FILED ON: JANUARY 15, 2021

BILAL ABDUL KAREEM,
APPELLANT

v.

GINA CHERI HASPEL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00581)

Before: SRINIVASAN, *Chief Judge*, HENDERSON and MILLETT, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's dismissal pursuant to the state secrets privilege be vacated; and the case be remanded to the District Court with instructions to dismiss the complaint on the ground that Kareem lacks Article III standing,

in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: January 15, 2021

Opinion for the court filed by Circuit Judge Henderson.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMAD MUAFFAQ ZAIDAN, ***et al.*****,** **Plaintiffs,** **v.** **DONALD J. TRUMP, President of the United States,** ***et al.*****,** **Defendants.**	**Civil Action No. 17-581 (RMC)**

MEMORANDUM OPINION

(Filed Jun. 13, 2018)

Plaintiffs Ahmad Muaffaq Zaidan and Bilal Abdul Kareem are journalists who specialize in reporting on terrorism and conflict in the Middle East. Mr. Zaidan learned his name was included on a list of suspected terrorists and Mr. Kareem has been the victim or near victim of at least five aerial bombings while in Syria. Based on this information, the Plaintiffs believe their names are on a list of individuals the United States has determined are terrorists and may be killed (the so-called Kill List). Plaintiffs sue President Donald J. Trump, the Director of the Central Intelligence Agency (CIA), the Secretary of the Department of Defense (DOD), the Secretary of the Department of Homeland Security (DHS), the Attorney General, and the Director of National Intelligence (DNI), all in their official capacities, as well as the Department of Justice (DOJ),

DOD, DHS, and CIA. Plaintiffs allege that these officials and agencies violated the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, by putting Plaintiffs' names on the Kill List. Defendants move to dismiss for lack of subject-matter jurisdiction, arguing that Plaintiffs lack standing and raise a political question outside the jurisdiction of the courts. Defendants also move to dismiss for failure to state a claim upon which relief may be granted. The Court will grant the Motion to Dismiss in part and deny it in part.

I. BACKGROUND

The Court takes its facts from the Complaint which the government, at this early stage of the litigation, has not controverted. Mr. Zaidan is a Syrian and Pakistani citizen who has been employed as a journalist by Al Jazeera for over 20 years. Compl. [Dkt. 1] ¶ 3. Mr. Kareem is an American citizen and freelance journalist, reporting for BBC, Channel 4 in the United Kingdom, CNN, Sky News, and Al Jazeera. *Id.* ¶ 4. Both Mr. Zaidan and Mr. Kareem regularly investigate and report on terrorism and its causes in the Middle East. *Id.* ¶¶ 3-4.

As part of his reporting, Mr. Zaidan was one of only two journalists who interviewed Osama bin Laden prior to the attacks on September 11, 2001. *Id.* ¶ 3. Mr. Zaidan was not involved in planning the 9/11 attack or any other attack. *Id.* ¶¶ 20-21. He has no association with Al-Qaeda or the Taliban and poses no threat to the United States or its citizens. *Id.* ¶¶ 22-23. Mr.

Zaidan's work does, however, require him to communicate frequently "with sources who have connections [to] terrorists and their associates" and to travel in countries where terrorists are active. *Id.* ¶ 26. In addition to bin Laden, Mr. Zaidan has interviewed other terrorist leaders such as Baitullah Mehsud of the Tehreek-e Taliban-e Pakistan (Taliban Movement of Pakistan) and Abu Mohammad al-Jolani of the Al Nusra Front. *Id.* ¶¶ 30-31. In 2015, Mr. Zaidan traveled in Syria reporting on battles of the Free Syrian Army; as a result, he says that he was listed on Syrian State Television as a member of Al-Qaeda. *Id.* ¶ 32. Mr. Zaidan alleges on information and belief that his actions as a journalist caused him to be listed in a U.S. intelligence document called SKYNET, which identified potential terrorists based on their metadata (electronic patterns of communications, writings, social media postings, and travel). *Id.* ¶ 33. He believes that because he was identified by SKYNET as a potential terrorist, he has also been included on the Kill List, allowing him to be targeted and killed. *Id.* ¶ 35.

Similarly, Mr. Kareem has no association with Al-Qaeda or the Taliban, has never participated in the planning of a terrorist attack, and has never aided any organization or individual which engages in terrorism. *Id.* ¶¶ 40-42. He is currently employed by On the Ground Network (OGN) and tasked with investigative journalistic coverage of the anti-Assad rebels in Syria. *Id.* ¶ 45. This work involves interactions with "local 'militants' during interviews." *Id.* In June 2016, Mr. Kareem was at the location of four different aerial

attacks. *Id.* ¶¶ 47-50. The first and fourth incidents involved strikes to the OGN office in Idlib City when Mr. Kareem was inside the office. *Id.* ¶¶ 47, 50. The second attack occurred in the town of Hariyataan while Mr. Kareem was there conducting an interview. *Id.* ¶ 48. The strike hit the exact location where Mr. Kareem was setting up for the interview, but at the time of the strike he had climbed a nearby hill to "view destroyed homes a street away." *Id.* The third attack occurred when the vehicle in which Mr. Kareem and his staff were traveling was "struck and destroyed by a drone-launched Hellfire missile." *Id.* ¶ 49. At the time of the strike, Mr. Kareem was sitting in a different, nearby vehicle which was "hurled into the air by the force of the blast" and "flipped upside down." *Id.* In August 2016, Mr. Kareem was again the victim of an attack when he was at the Kulliyatul Midfa'iyyah (Artillery College) to film. *Id.* ¶ 51. He and his coworkers were in his car "when there was a huge blast only yards away from the car." *Id.* The occupants survived, but all were hit by shrapnel from the blast. *Id.* As a result of these five near-miss experiences in a three-month period, Mr. Kareem alleges upon information and belief that he was the target and that his name is included on the United States Kill List. *Id.* ¶ 52.

According to the Complaint, the United States has publically disclosed that it "conducts lethal strikes targeted at individuals, using remotely piloted aircraft, among other weapons, and that targets are selected . . . as a result of a 'process' in which targets are nominated by one or more defendants, and their inclusion on the

Kill List is confirmed through a series of meetings and discussions among defendants." *Id.* ¶ 55. Then-President Barack H. Obama issued the Presidential Policy Guidance on May 22, 2013, which delineated guidelines and provided for oversight and accountability in the process of designating individuals for the Kill List. *Id.* ¶ 57; *see also* Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (May 22, 2013), https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf (Presidential Policy Guidance). On August 6, 2016, the Presidential Policy Guidance was made public. *Id.* ¶ 58. It includes guidance on designating individuals based only on metadata (or without knowing their identities), as well as the "necessary preconditions for taking lethal action." *Id.* ¶¶ 61, 63.

Plaintiffs allege that Defendants violated the APA when Defendants added Plaintiffs' names to the so-called Kill List because Plaintiffs do not meet the preconditions listed in the Presidential Policy Guidance. *Id.* ¶ 64. Plaintiffs also challenge the lack of notice and opportunity to refute their inclusion on the Kill List. *Id.* ¶ 65. The Complaint advances six counts under the APA:

> Count One: Inclusion of Plaintiffs on the Kill List was arbitrary, capricious and an abuse of discretion.
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> Count Two: Inclusion of Plaintiffs on the Kill List was not in accord with law because it (1) "violates the prohibition on conspiring

> to or assassinating any person abroad contained in Executive Order 12,333"; (2) "violates the prohibition against war crimes contained in 18 U.S.C. § 2441 because it constitutes a grave breach of common article 3 of the Geneva Conventions as specified in 18 U.S.C. § 2441(c)(3)"; (3) "violates Article 6 of the International Covenant on Civil and Political Rights"; and (4) "violates 18 U.S.C. § 956(a)(1)."
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> Count Three: Inclusion of Plaintiffs on the Kill List exceeded Defendants' statutory authority "because it exceeds the authority given to the Executive pursuant to the Authorization for the Use of Military Force."
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> Count Four: Inclusion of Plaintiffs on the Kill List violated due process because Plaintiffs were provided no notice and given no opportunity to challenge their inclusion.
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> Count Five: Inclusion of Plaintiffs on the Kill List violated the First Amendment because it "has the effect of restricting and inhibiting their exercise of free speech and their ability to function as journalists entitled to freedom of the press."
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> Count Six (only as to Mr. Kareem): Inclusion of Plaintiff on the Kill List violated the Fourth and Fifth Amendments because it constituted an illegal seizure and "seeks to deprive [Mr. Kareem] of life without due process of law."

Id. ¶¶ 70, 72-76, 78, 82-83, 85, 90-91. In the present posture of the case, the Court must accept all plausible

factual allegations in the Complaint as true. *See Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004).

On June 5, 2017, Defendants moved to dismiss. Mem. of P. & A. in Supp. of Defs.' Mot. to Dismiss (Mot.) [Dkt. 8-1]. Plaintiffs opposed. Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss (Opp'n) [Dkt. 10]. Defendants replied. Defs.' Reply Mem. in Supp. of Their Mot. to Dismiss (Reply) [Dkt. 11]. The Court heard oral argument on May 1, 2018.

II. LEGAL STANDARDS

A. Motion to Dismiss – Fed. R. Civ. P. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move to dismiss a complaint, or any portion thereof, for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). No action of the parties can confer subject-matter jurisdiction on a federal court because subject-matter jurisdiction is both a statutory requirement and an Article III requirement. *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003). The party claiming subject-matter jurisdiction bears the burden of demonstrating that such jurisdiction exists. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (noting that federal courts are courts of limited jurisdiction and "Mt is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction").

When reviewing a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), a court must review the complaint liberally, granting the plaintiff the benefit of all inferences that can be derived from the facts alleged. *Barr*, 370 F.3d at 1199. Nevertheless, "the Court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the Court accept plaintiffs' legal conclusions." *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006). A court may consider materials outside the pleadings to determine its jurisdiction. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003). A court has "broad discretion to consider relevant and competent evidence" to resolve factual issues raised by a Rule 12(b)(1) motion. *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 873 F. Supp. 2d 363, 368 (D.D.C. 2012) (citing 5B Charles Wright & Arthur Miller, Fed. Prac. & Pro., Civil § 1350 (3d ed. 2004)); *see also Macharia v. United States*, 238 F. Supp. 2d 13, 20 (D.D.C. 2002), *aff'd*, 334 F.3d 61 (2003) (in reviewing a factual challenge to the truthfulness of the allegations in a complaint, a court may examine testimony and affidavits). In such circumstances, consideration of documents outside the pleadings does not convert the motion to dismiss into one for summary judgment. *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 21 (D.D.C. 2003).

B. Motion to Dismiss – Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) requires a complaint to be sufficient "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Although a complaint does not need to include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The facts alleged "must be enough to raise a right to relief above the speculative level." *Id.* A complaint must contain sufficient factual matter to state a claim for relief that is "plausible on its face." *Id.* at 570. When a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, then the claim has facial plausibility. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A court must treat the complaint's factual allegations as true, "even if doubtful in fact." *Twombly*, 550 U.S. at 555. A court need not accept as true legal conclusions set forth in a complaint. *Iqbal*, 556 U.S. at 678.

III. ANALYSIS

Defendants provide three alternative arguments to support their motion to dismiss. First, they argue

the Court lacks subject-matter jurisdiction "because Plaintiffs have not alleged sufficient facts to establish that they have standing to bring their lawsuit." Mot. at 1. Second, they argue that the Court lacks subject-matter jurisdiction because Plaintiffs raise a political question that would require the Court "to probe into sensitive and complex national security decisions." *Id.* at 2. Finally, they move to dismiss under Rule 12(b)(6), arguing that Plaintiffs have failed to state a claim upon which relief may be granted because they "have not pled sufficient facts to establish that the alleged unlawful actions have even occurred." *Id.* The Court will address each argument in turn.

A. Subject-Matter Jurisdiction

1. Standing

Standing is part and parcel of Article III's limitation on the judicial power of the federal courts, which extends only to cases or controversies. U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority [and] to Controversies. . . ."); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). The strictures of Article III standing are by now "familiar." *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013). Standing requires (1) the plaintiff to have suffered an injury in fact that is both (a) concrete and particularized and (b) actual or imminent, as opposed

to conjectural or hypothetical; (2) the injury must be traceable to the defendants' actions; and (3) the injury must be redressable by a favorable decision of the court. *See id.* at 2685-86 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992)).

A federal court must assure itself of both constitutional and statutory subject-matter jurisdiction. The former obtains if the case is one "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. The relevant statute, 28 U.S.C. § 1331, likewise confers jurisdiction upon lower courts to hear "all civil actions arising under the Constitution, laws, or treaties of the United States." Federal courts have constitutional and statutory "arising under" jurisdiction whenever a plaintiffs claim "will be sustained if the Constitution is given one construction and will be defeated if it is given another." *Powell v. McCormack*, 395 U.S. 486, 514-16 (1969) (citing *Bell v. Hood*, 327 U.S. 678, 685 (1946); *King Cnty. v. Seattle Sch. Dist. No. 1*, 263 U.S. 361, 363-64 (1923)).

a. Injury-in-fact

A plaintiff must allege an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *See Windsor*, 133 S. Ct. at 2685 (citing *Lujan*, 504 U.S. at 559-62). Allegations of speculative or possible future injury do not satisfy the requirements of Article III. "A threatened injury must be certainly impending to constitute

injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

When an alleged injury has not yet occurred, courts must determine whether it is imminent. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). An injury is imminent if the threatened injury is "certainly impending" or if there is substantial risk that the harm will occur. *Id.* "[P]laintiffs bear the burden of pleading . . . concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court." *Id.* at 414 n.5 (internal quotations and citation omitted).

Defendants argue that both Plaintiffs fail to meet the "injury-in-fact" prerequisite for standing because none of the factual allegations demonstrates that they have suffered harm or that there is a substantial risk of future harm. Defendants contend that none of Plaintiffs' allegations—the inclusion of Mr. Zaidan's name on SKYNET or Mr. Kareem's repeated near-miss incidents—indicates that either Plaintiff is actually on the Kill List, which Defendants appear to concede would itself constitute harm or demonstrate a substantial risk of future harm. *See* Mot. at 3-11.

i. Mr. Zaidan lacks standing to sue.

Mr. Zaidan asserts, upon information and belief, that his name is on the Kill List because of the nature of his metadata, that is (1) as part of his job as a

journalist he communicates frequently with individuals who have connections to terrorists, (2) his social media accounts contain words and phrases associated with terrorism, and (3) he has interviewed leaders of al-Qaeda and the Taliban and other terrorist organizations, which caused him to be identified as a potential target by SKYNET, an allegedly

classified U.S. intelligence document. Compl. ¶¶ 26-34.

Defendants argue that Mr. Zaidan cannot rely on a purportedly classified document (SKYNET), despite its availability in the public domain on the Internet. They cite *Alfred A. Knopf Inc. v. Colby* for this proposition. 509 F.2d 1362, 1370 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975). Defendants over-read *Knopf* a case in which former government employees challenged deletions required by the CIA of information in their proposed book. *See id.* at 1365. *Knopf* evaluated the impact of the then-newly adopted Freedom of Information Act (FOIA), 5 U.S.C. § 552, on *EPA v. Mink*, 410 U.S. 73 (1972), which had held that "executive decisions respecting the classifying of information are not subject to judicial review." *Knopf* 509 F.2d at 1367. "The legislative history [of FOIA] makes it clear that the Congress intended to overthrow the result of *Mink*." *Id.* In that context, the Fourth Circuit reversed the District Court for having imposed too high a burden on the government to prove the classified status of the deleted materials. *Id.* at 1370. It then held that "individuals bound by the secrecy agreements [as part of their government employment] may not disclose information,

still classified, learned by them during their employments regardless of what they may learn or might learn thereafter." *Id.* at 1371. *Knopf* further held that such secrecy obligations continue as to classified information even if revealed by a non-official source after the person's government employment has ended. *Id.* Defendants do not suggest that Mr. Zaidan learned of SKYNET as part of employment with the United States government or that he is, therefore, prohibited from disclosing any information concerning it. To the contrary, Mr. Zaidan alleges that some information from SKYNET was publicized by unknown persons on the Internet and it included his name as prime among persons whose metadata caused them to be suspected of terrorist activities. That information, whether or not classified, may be cited by Plaintiffs although its weight may be subject to attack.

The Complaint alleges that "Defendants' false classification of plaintiff Zaidan as a terrorist, based on SKYNET's metadata analysis, has prompted defendants to place him on their Kill List and target him to be killed." Compl. ¶ 35. Defendants insist that even if Mr. Zaidan's name is on a SKYNET list of "potential terrorists," he has failed to allege adequately a link between SKYNET and the Kill List. This point is well taken. When reviewing a motion to dismiss, a court must assume that all plausible factual allegations are true; nonetheless, the alleged injury cannot be "conjectural or hypothetical." *Lujan*, 504 U.S. at 560; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative

level."). Therefore, the Court assumes the accuracy of Mr. Zaidan's allegations that he is a journalist who regularly meets with individuals tied to terrorists, that he has interviewed terrorist leaders, and that he found his name on a SKYNET list of potential terrorists. These facts, however, are not sufficient to allege plausibly that his name is on a U.S. Kill List; that conclusion is mere speculation presented as a fact. As did the plaintiffs in *Clapper v. Amnesty International USA*, Mr. Zaidan presents a list of factual allegations that is too attenuated from the final necessary allegation. 568 U.S. at 410-11. In other words, while Mr. Zaidan would not need to plead with certainty or have actual proof that his name is on a Kill List, his current allegations would require the Court to find that it is plausible that every individual whose name is on the SKYNET list of potential terrorists is also on a Kill List, for which there is no evidence of fact or logic. To the contrary, Mr. Zaidan does not allege that a single individual on the SKYNET list has been the subject of a United States drone strike or targeted for lethal action. While it is possible that there is a correlation between a list like SKYNET and the Kill List, the Court finds no allegations in the Complaint that raise that possibility above mere speculation. Accordingly, the Court finds Mr. Zaidan has failed to allege a plausible injury-in-fact and therefore has no standing to sue.[1] Because the Court

[1] The Opposition argues that a "disposition matrix" reported by the *Washington Post* indicates that an individual's inclusion on the SKYNET list could lead to results other than death, such as capture and interrogation or rendition. Opp'n at 11 n.4. The news article constitutes inadmissible hearsay and cannot be

concludes that Mr. Zaidan has no standing to pursue his lawsuit, the remaining arguments will be analyzed only as they pertain to Mr. Kareem.

ii. Mr. Kareem has demonstrated standing.

Mr. Kareem alleges that he is on the Kill List because he was the victim of five near-miss attacks within a three-month period in 2016. Two of the attacks involved his place of work, one involved his own vehicle, one involved a work vehicle in which he had been traveling immediately before, and one hit a location from which he had just walked away. *See* Compl. ¶¶ 46-51. Defendants argue that Mr. Kareem was on "battlefields in Syria" and that he merely alleges "he has sustained or narrowly escaped war-related injuries." Mot. at 8. Even assuming the facts of the attacks are true, Defendants argue that Mr. Kareem has provided no reason to believe they are "attributable to anything more than a journalist reporting from a dangerous and active battlefield." *Id.* Defendants ask the Court to consider independent sources which conclude that Syria is a volatile place where forces from multiple countries and groups engage in hostilities and attacks, making implausible Mr. Kareem's allegations

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relied upon in analyzing Mr. Zaidan's injury. The Complaint does not allege or challenge Mr. Zaidan's inclusion on a list of potential terrorists that the United States seeks to capture but only inclusion on the Kill List.

that the attacks he suffered were at the hands of the United States and not other combatants.

Mr. Kareem alleges that the United States engages in targeted drone strikes,[2] that he has been the near victim of a military strike on five occasions (at least one of which included the use of a drone), and that he is a journalist who is often in contact with rebel or terrorist organizations. Compl. ¶¶ 44-52, 55-59. Accepting all well-pled allegations as true, Mr. Kareem has plausibly alleged that he was in 2016 a target on the Kill List with evidence that makes it "more than a sheer possibility." *Iqbal*, 556 U.S. at 678. Although Defendants set forth other plausible alternatives, such as the fact that Mr. Kareem could have been targeted by Syria for reporting on anti-Assad efforts, their argument does not make it implausible that the attacks were a result of U.S. action; at oral argument, Defendants conceded that Mr. Kareem specifies that at least one of the strikes was from a Hellfire missile of the kind used by the U.S. without identifying the other weapons to the contrary. The Court concludes that Mr. Kareem has adequately pled injury-in-fact.[3]

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[2] *See, e.g.*, *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

[3] Since the Complaint alleges that Mr. Kareem was on the U.S. Kill List in 2016 but was not killed, it posits that his danger continues to the present time. Having filed a motion to dismiss based solely on legal arguments, the government makes no factual argument to the contrary.

b. Causation

Causation is the second element of standing and is just as critical as injury-in-fact. Causation requires "a causal connection between the injury and the conduct complained of" *Lujan*, 504 U.S. at 560. The harm alleged must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

Defendants do not directly rebut Mr. Kareem's allegations of causation, but do argue that "the more plausible explanation" for Mr. Kareem's narrow escapes from injury in five different strikes "is that he has chosen to work as a journalist in a country rife with violence and warfare." Reply at 8. *Twombly* and *Iqbal* do not, however, require a plaintiff to allege the *most* plausible set of facts, but merely *a* plausible set of facts. *See Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). While it is plausible that Mr. Kareem is not being targeted by the United States, it is also plausible that Mr. Kareem's multiple near-miss incidents were caused by Defendants' decision to include him on the Kill List and were, therefore, caused by Defendants' actions. Probability is not the standard on a motion to dismiss.

c. Redressability

The last element of standing is redressability, requiring that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations and citation omitted); *see also In re Sci. Applications Int'l Corp. (SAIC) Backup Take Data Theft Litig.*, 45 F. Supp. 3d 14, 33 (D.D.C. 2014). Defendants make no arguments regarding redressability and thus the matter is conceded. The Court finds that if Mr. Kareem succeeds in this case his injury can be redressed through an injunction or order from this Court requiring, at the least, that the United States review and consider his evidence before it directs lethal force against him.

2. Sovereign Immunity

There must be a valid waiver of the United States' sovereign immunity for Mr. Kareem to bring claims against an agency of the United States through its officials, as he does here. *See, e.g.*, *Block v. North Dakota*, 461 U.S. 273, 287 (1983) ("The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress."). Naming the heads of agencies as defendants in their official capacities results in a lawsuit against the United States. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) ("Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (quoting *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658,

690 n.55 (1978))). The principles of sovereign immunity apply equally to federal agencies, officers, and employees acting in their official capacities. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). The United States' exemption from suit is expressed in jurisdictional terms—that is, federal courts lack subject-matter jurisdiction over suits against the United States in the absence of a clear waiver of sovereign immunity. *See, e.g.*, *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) ("[A] plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss."). Statutes that waive sovereign immunity are strictly construed and any doubt or ambiguity is resolved in favor of immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

The Complaint advances multiple claims by Mr. Kareem based on the APA. That statute waives the government's sovereign immunity from suit for individuals "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 ("The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States."). APA review is precluded if an applicable statute bars judicial review, if the "agency action is committed to agency discretion by law," or if the entity sued

is exempt from the APA's definition of agency in § 701(b)(1). *Id.* § 701(a), (b)(1).

To begin, the Court will dismiss all claims against President Trump because the President is not an agency within the meaning of the APA. *See Dalton v. Specter*, 511 U.S. 462, 467-68 (1994) ("[T]he APA does not apply to the President"); *Franklin v. Massachusetts*, 505 U.S. 788, 796-801 (1992).

Defendants argue that all of Mr. Kareem's claims must be dismissed because "military authority exercised in the field in time of war or in occupied territory" is exempt from the definition of agency action in the APA. 5 U.S.C. § 701(b)(1)(G). These arguments may prove applicable, but Defendants fail to demonstrate at this point that the challenged action took place "in the field in time of war."

The action at issue is the alleged decision of the United States to place Mr. Kareem on the Kill List. The Complaint alleges that this decision was made in the manner dictated by the Presidential Policy Guidance, whereby it was discussed, debated, and decided in Washington, D.C. Thus, while execution of such a decision would be an exercise of military authority in the field, the Complaint plausibly argues that the decision itself was made by authorities who were not "in the field" as required for the APA exemption to apply.

Further, Defendants fail to identify the war in which the United States is or was engaged and relegate the argument to a single sentence in a footnote. Somewhat contrary to this semi-argument,

Defendants also repeatedly argue in brief and at oral argument that the conflict in Syria is an internal civil war among Syrians, in which the United States merely provides military assistance. *See* Mot. at 9. From the former perspective, Defendants insist that the APA does not apply due to this "time of war," while from the latter, Defendants assert that the United States has such a limited military presence in Syria it is not plausible the attacks against Mr. Kareem were the result of U.S. action. Of course, a non-traditional war can be a "time of war" exempt from APA coverage, but Defendants fail to identify the war at issue. *See Anderson v. Carter*, 802 F.3d 4, 8-9 (D.C. Cir. 2015) (finding that "hostilities may subsist between two nations on a limited basis, which would [once] be properly termed [an] imperfect war" and is now called an "undeclared war"); *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 129 (D.D.C. 2003) (finding judicial review permissible of order that military submit to anthrax vaccine because, in part, "the order . . . was given by the Secretary of Defense, not by commanders in the field"); *Jaffee v. United States*, 592 F.2d 712, 719-20 (3d Cir. 1979) (questioning whether actions taken in the United States during the Korean War could be considered "in the field"); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1217-18 (S.D. Fla. 2002) (allowing discovery on whether APA's exception of "military authority" from court review applied to the Army's seizure of property expropriated by the Hungarian government during World War II). The Court does not close its eyes to the fact that the U S military is engaged in warfare in Syria and elsewhere, but Defendants fail to use such terms. This may seem like a

foolish requirement under the circumstances, but it pertains by statute nonetheless.

The undeveloped facts and legal arguments presented by Defendants are insufficient to prompt dismissal of Mr. Kareem's Complaint. Defendants do not disavow the Presidential Policy Guidance or its applicability to any decision in 2016 or earlier to put Mr. Kareem's name on the Kill List, as he alleges. The Presidential Policy Guidance supports his argument that the relevant decisions are made far from the field of battle. Mr. Kareem complains of an alleged decision to authorize a lethal strike against him and not a decision in the field to attempt to carry out that authorization. He wants the opportunity to persuade his government that he is not a terrorist or a threat so that the alleged authorization to kill is rescinded. This legal approach to resolving the issue has previously been recommended by this District Court and sustained on appeal. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (*en banc*); *bin Ali Jaber v. United States*, 861 F.3d 241, 246 (D.C. Cir. 2017).

3. Political Question

Finally, Defendants urge the Court to find that there is no judicial role here because Mr. Kareem's Complaint raises a political question for which the Judiciary is ill-equipped to rule. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value

determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962).

However, "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and the political question doctrine's "shifting contours and uncertain underpinnings" make it "susceptible to indiscriminate and overbroad application to claims properly before the federal courts," *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985). "The political question doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed. The Court has relied on the doctrine only twice in the last 50 years." *El-Shifa*, 607 F.3d at 856 (Kavanaugh, J., concurring in judgment).

When evaluating whether an issue involves a political question, courts consider a number of factors; the presence of one such factor is sufficient to find a political question. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). A court considers whether the case presents:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially

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

Baker, 369 U.S. at 217. The government focuses on the first two *Baker* factors and argues that the decision of whether to target an individual for lethal action is a wartime decision that is committed to the executive with no judicially manageable standard for review. Mr. Kareem argues that this case is most similar to *People's Mojahedin Organization v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), which concerned a challenge to the State Department's identification of the People's Mojahedin Organization as a terrorist organization. The D.C. Circuit found that the question was subject to judicial review because the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1189, specified the standards to apply. *Id.* at 113. Mr. Kareem urges the Court to find that it can evaluate the decision to include Mr. Kareem on the Kill List just as courts evaluate a decision to label an organization as a terrorist organization under AEDPA.

Judges on this Court have struggled before with these issues in analogous contexts. Judge John Bates

decided that Nasser al-Aulaqi, father of terrorist Anwar al-Aulaqi, did not have standing to sue the United States to prevent it from targeting his son with a drone strike. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (*al-Aulaqi I*). In discussing the difficulty of the issues, Judge Bates asked: "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?" *Id.* at 8. Nonetheless, he agreed that "[t]he difficulty that U.S. courts would encounter if they were tasked with 'ascertaining the "facts" of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question posed is a "political" one.' " *Id.* at 45 (quoting *DaCosta v. Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973)). Judge Bates then concluded, with some discomfiture, "that there are circumstances in which the Executive's unilateral decision to kill a U.S. citizen overseas" is "judicially unreviewable." *Id.* at 51. Finding such a circumstance presented in that case, Judge Bates dismissed Nasser al-Aulaqi's suit.

After "the United States intentionally targeted and killed [Anwar al-Aulaqi] with a drone strike in Yemen on September 30, 2011," "[b]ecause [he] was a terrorist leader of al Qa'ida in the Arabian Peninsula," Nasser al-Aulaqi sued various U.S. persons, under a *Bivens* theory of liability, in a separate case before this Judge. *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58 (D.D.C. 2014) (*al-Aulaqi II*); *see also Bivens v. Six Unknown*

Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). "It was al-Aulaqi's actions—and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the U.S. homeland—that led the United States to take action." *Al-Aulaqi II*, 35 F. Supp. 3d at 64 (citing a letter from then-Attorney General Holder) (internal citation omitted). The question presented was whether "federal officials can be held personally liable for their roles in drone strikes abroad that target and kill U.S. citizens. The question raise[d] fundamental issues regarding constitutional principles." *Id.* at 58. The Court in *al-Aulaqi II* found Nasser alAulaqi's second case to be justiciable "[b]ecause Plaintiffs . . . pointedly allege[d] that Defendants, U.S. officials, intentionally targeted and killed U.S. citizens abroad without due process. . . ." *Id.* at 70. *Al-Aulaqi II* was ultimately dismissed after the undersigned declined to extend *Bivens* into new territory.

Neither of the *al-Aulaqi* cases bears directly on the instant Complaint. Judge Bates read the complaint in *al-Aulaqi I* as asking him to determine the facts and judge the legitimacy of military decisions made thousands of miles away, which is not the case here. *Al-Aulaqi II* is similarly distinguishable because Nasser al-Aulaqi attempted to extend *Bivens* allowing challenges to federal actors on constitutional grounds—beyond its grasp. It remains a truism that judges are not good judges of military decisions during war. The immediate Complaint asks for no such non judicial feat; rather, it alleges that placement on the Kill List occurs

only after nomination by a defense agency principal and agreement by other such principals, with prior notice to the President. The persons alleged to have exercised this authority are alleged to have followed a known procedure that occurred in Washington or its environs.

With this combination of precedents in mind, the Court will evaluate each Count to determine if it presents a political question that is not for judicial review.

a. Count One – Agency action was arbitrary and capricious, and an abuse of discretion

Count One asks the Court to examine whether the defense agencies allegedly involved in the decision to place Mr. Kareem on the Kill List complied with the process set out in Section Three of the Presidential Policy Guidance: the "policy standard and procedure for designating identified HVTs [high value targets] for lethal action." Presidential Policy Guidance at 11. The Court finds that the Presidential Policy Guidance fails to provide a judicially manageable standard.

AEDPA, on which *People's Mojahedin* rested, requires a series of formal findings that an organization meets certain criteria before it can be labeled an international terrorist organization: "(A) the organization is a foreign organization"; "(B) the organization engages in terrorist activity" as defined in AEDPA; and "(C) the terrorist activity of the organization threatens the security of United States nationals or the national

security of the United States." 8 U.S.C. § 1189(a)(1). In direct contrast, the Presidential Policy Guidance provides no test or standard that must be satisfied before the government may add an individual (known or unknown) to the Kill List; it only specifies the steps and processes that the relevant defense agencies must complete. *See* Presidential Policy Guidance at 11-14. When an individual who is not a U.S. person is proposed for lethal action, and the principals of the relevant defense agencies unanimously decide that lethal action should be taken, the principal of the nominating agency may approve lethal action after prior notice to the President. *Id.* at 14 § 3.E.1. When a known U.S. person is proposed for lethal action, such as a U.S. citizen overseas, the defense agencies make a recommendation but it is the President who ultimately decides whether to target that U.S. person for lethal action. *See id.* at 14 § 3.E. In neither decision-making process is the decision-maker required to make preliminary findings or follow a specific process.

The analogy between AEDPA and the Presidential Policy Guidance is too imperfect for case law on the former to support a conclusion here that the Presidential Policy Guidance provides requisite standards for judicial review. As an emphasis to this conclusion, the Presidential Policy Guidance itself states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Presidential Policy

Guidance at 18 § 8.A. AEDPA, however, specifically provides a reviewable right to challenge an organization's designation as a terrorist organization. *See* 8 U.S.C. § 1189(c)(1) ("Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit.").

Whether Defendants complied with the Presidential Policy Guidance is a political question the Court must refrain from addressing. Count One will be dismissed.

b. Counts Two and Three – Agency action was not in accord with law or statutory authority

Counts Two and Three challenge the legal authority upon which the Defendants based their decision to add Mr. Kareem to the Kill List. Mr. Kareem argues such a decision was not in accord with law and was in excess of statutory authority because it: (1) "violate[d] the prohibition on conspiring to or assassinating any person abroad contained in Executive Order 12,333"; (2) "violate[d] the prohibition against war crimes contained in 18 U.S.C. § 2441"; (3) "violate[d] Article 6 of the International Covenant on Civil and Political Rights"; (4) "violate[d] 18 U.S.C. § 956(a)(1), which prohibits conspiracy to commit murder or maiming outside the United States"; and (5) "exceed[ed] the

authority given to the Executive pursuant to the Authorization for the Use of Military Force."[4] Compl. ¶¶ 73-76, 78.

This Court follows the functional approach to the political question doctrine adopted by the D.C. Circuit in *El-Shifa Pharmaceutical Industries v. United States* and applied in *Bin Ali Jaber v. United States.* The Circuit distinguishes between "claims requiring [courts] to decide whether taking military action was wise—a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch" and "claims presenting purely legal issues such as whether the government had legal authority to act." *El-Shifa*, 607 F.3d at 842; *see also Jaber*, 861 F.3d at 246. As discussed above, Mr. Kareem's first claim would require the Court to delve into the propriety or merit of the decision to place Mr. Kareem on the Kill List, which is beyond the Court's authority. Counts Two and Three, on the other hand, appear at first blush to present "pure[ ] legal issues," namely whether Defendants violated a pertinent legal authority when they placed Mr. Kareem on the Kill List. However, the process of determining whether Defendants exceeded their authority or violated any of the statutes referenced in the Complaint would

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[4] The Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons [that] he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (quoting 115 Stat. 224, § 2(a)).

require the Court to make a finding on the propriety of the alleged action, which is prohibited by the political question doctrine. Therefore, the Court finds Counts Two and Three raise a nonjusticiable political question and must be dismissed.

c. Counts Four, Five, and Six – Defendants denied Mr. Kareem his rights to due process and the opportunity to be heard and deprived him of his First, Fourth, and Fifth Amendment rights

Counts Four, Five, and Six ask the Court to find that Mr. Kareem was deprived of his constitutional rights when Defendants designated him for the Kill List and denied him of a prior opportunity to be heard. *See* Compl. ¶¶ 81-93. "[T]he Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions." *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988) (citing *Regan v. Wald*, 468 U.S. 222 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981)); *see also Boumediene v. Bush*, 553 U.S. 723, 742 (2008) ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."); *Hamdi*, 542 U.S. at 536-37 (emphasizing, with respect to challenges to the factual basis of a citizen's detention, that "it would turn our system of checks and balances on its head to

suggest that a citizen could not make his way to court with a challenge to . . . his detention by his Government, simply because the Executive opposes making available such a challenge"); *id.* at 536 ("Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (recognizing "the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed"); *Vance v. Rumsfeld*, 653 F.3d 591, 618-19 (7th Cir. 2011), *rev'd en banc on other grounds*, 701 F.3d 193 ("Courts reviewing claims of torture in violation of statutes such as the Detainee Treatment Act or in violation of the Fifth Amendment do not endanger the separation of powers, but instead reinforce the complementary roles played by the three branches of our government.").

Due process is not merely an old and dusty procedural obligation required by Robert's Rules.[5] Instead, it is a living, breathing concept that protects U.S. persons from overreaching government action even, perhaps, on an occasion of war. In *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, a group of U.S. citizens living in Nicaragua advanced Fifth Amendment claims challenging U.S. support of military actions by the so-called "Contras." 859 F.2d at 935. They argued that U.S. funding to the Contras deprived the plaintiffs of liberty and property without due process

[5] *Robert's Rules of Order* is a commonly used manual of parliamentary or organizational procedure in the United States.

of law because the plaintiffs were physically threatened by the war in Nicaragua and were the intended targets of the Contras. *Id.* On appeal, the D.C. Circuit decided that the plaintiffs' due process claims were "serious allegations and not ones to be dismissed as nonjusticiable" because "the Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry." *Id.* (quoting *Ramirez de Arellano*, 745 F.2d at 1515).[6]

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). It requires that a plaintiff show a protected interest in life, liberty, or property, *see Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005), and that government officials knowingly deprived him of that interest, *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986), without notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Mr. Kareem alleges that the Defendants targeted him for lethal force by putting his name on the Kill List, which he deduces from five near misses by drones or other military strikes. As a U.S. citizen, he seeks to clarify his status and profession to

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[6] *U.S. Citizens v. Reagan* found the plaintiffs' Fifth Amendment claims justiciable, but ultimately declined to hear them because the plaintiffs did not allege that the United States participated in or encouraged injuries to Americans in Nicaragua. *See* 859 F.2d at 934-35.

Defendants and, thereby, assert his right to due process and a prior opportunity to be heard. His interest in avoiding the erroneous deprivation of his life is uniquely compelling *See Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) ("The private interest in the accuracy of a criminal proceedings that places an individual's life or liberty at risk is almost uniquely compelling."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

Defendants rely on the analysis in *El-Shifa* to contend that this case is non-justiciable. *See* 607 F.3d 836. The *El-Shifa* plaintiffs were owners of a Sudanese pharmaceutical plant who sued the United States after their plant was destroyed by a missile strike. U.S. officials asserted that the plant had been producing chemical weapons for Osama bin Laden. *Id.* at 838-39. The plaintiffs sought compensation for the plant's destruction and the retraction of allegedly defamatory statements connecting them to al-Qaeda. *Id.* at 839. The Circuit dismissed their suit as barred by the political question doctrine. *Id.* at 840-44. *El-Shifa* is distinguishable from this case in key respects—the *El-Shifa* plaintiffs were not U.S. persons and there was no allegation that they had a substantial connection to the United States that might have given rise to cognizable constitutional rights. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed

substantial connections with this country."); *32 Cnty. Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (holding that a foreign plaintiff was not entitled to due process regarding the State Department's designation of it as a foreign terrorist organization because plaintiff did not have a controlling interest in property in the United States and did not show any other substantial connection). Importantly, unlike the plaintiffs in *El-Shifa* and *Jaber*, Mr. Kareem does not seek a ruling that a strike by the U.S. military was mistaken or improper. He seeks his birthright instead: a timely assertion of his due process rights under the Constitution to be heard before he might be included on the Kill List and his First Amendment rights to free speech before he might be targeted for lethal action due to his profession. The D.C. Circuit and the Supreme Court have previously held that a citizen "must have a meaningful opportunity to challenge the factual basis for his designation as an enemy combatant." *Doe v. Mattis*, 889 F.3d 745, 759 (D.C. Cir. 2018); *see also Hamdi*, 542 U.S. at 533 ("[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."). The Circuit recently extended the protections provided to detainees in *Hamdi v. Rumsfeld* to a citizen in a foreign country opposing transfer from U.S. custody to the custody of another nation. *See Doe v. Mattis*, 889 F.3d at 761-62. While these latter cases provide only guidance, not decision, their guidance is useful here because constitutional norms were

extended to U.S. citizens abroad despite the context of war-making. The difference between them and the instant matter is also notable: Mr. Kareem is not in U.S. custody and, if targeted because he is on the Kill List, may well have been identified by means other than his name, profession, place of birth, and the like. Now that he has made it to a U.S. court, however, his constitutional rights as a citizen must be recognized.

Neither of the *al-Aulaqi* decisions provides a useful final analysis here. Nasser al-Aulaqi challenged "the facts of military decisions exercised thousands of miles from the forum" and did so before the Presidential Policy Guidance was developed in 2013 or published in 2016, thereby establishing the system whereby such identification of targets is made by the principals of U.S. defense agencies or the President in Washington. *Al-Aulaqi I*, 727 F. Supp. 2d at 45. The *Bivens* suit filed by Nasser al-Aulaqi after his son's death was decided on the peculiarities of *Bivens* precedent and the applicability of that decision to new fact patterns. This case is brought by a U.S. citizen who seeks to interpose accurate personal information concerning his profession and activities into specific targeting decisions.

These are weighty matters of law and fact but constitutional questions are the bread and butter of the federal judiciary. The Court finds that Counts Four, Five, and Six as presented by Mr. Kareem are justiciable.

B. Failure to State a Claim

Defendants' final argument in support of dismissal is the same as the first. They argue that Mr. Kareem's allegations that he has been put on the Kill List are implausible and, therefore, fail to state a claim upon which relief may be granted. For the reasons stated above, the Court finds that Mr. Kareem's allegations may be wrong as a matter of fact but the Complaint presents them in a plausible manner It will deny Defendants' motion to dismiss for failure to state a claim

IV. CONCLUSION

For the foregoing reasons the Court will grant in part and deny in part Defendants' Motion to Dismiss [Dkt. 8]. A memorializing Order accompanies this Memorandum Opinion.

Date: June 13, 2018

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMAD MUAFFAQ ZAIDAN, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, President of the United States, *et al.*,** **Defendants.**	**Civil Action No. 17-581 (RMC)**

ORDER

(Filed Jun. 13, 2018)

For the reasons stated in the Memorandum Opinion issued contemporaneously with this Order, it is hereby

ORDERED that Defendants' Motion to Dismiss [Dkt. 8] is **GRANTED** in part and **DENIED** in part; and it is

FURTHER ORDERED that all Counts as to Mr. Zaidan are **DISMISSED**, Counts One, Two, and Three as to Mr. Kareem are **DISMISSED**, and Donald J. Trump is **DISMISSED** as a Defendant. Counts Four, Five, and Six as to Mr. Kareem remain; and it is

FURTHER ORDERED that the Court will contact the parties to set a status conference.

Date: June 13, 2018

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BILAL ABDUL KAREEM, **Plaintiff,** **v.** **GINA CHERI HASPEL, Director of the Central Intelligence Agency, *et al.*,** **Defendants.**	**Civil Action No. 17-581 (RMC)**

MEMORANDUM OPINION

(Filed Sep. 24, 2019)

What constitutional right is more essential than the right to due process before the government may take a life? While the answer may be none, federal courts possess limited authority to resolve questions presented in a lawsuit, even when they are alleged to involve constitutional rights. This is such a case. Despite the serious nature of Plaintiffs allegations, this Court must dismiss the action pursuant to the government's invocation of the state secrets privilege.

Plaintiff Bilal Abdul Kareem is a journalist specializing in reporting on terrorism and conflict in the Middle East. Mr. Kareem has been the victim or near victim of at least five aerial bombings while in Syria. Accordingly, he believes his name is on a list of individuals the United States has determined are terrorists and may be killed (the so-called Kill List). Mr. Kareem

sues the Director of the Central Intelligence Agency (CIA), the Secretary of the Department of Defense (DOD), the Secretary of the Department of Homeland Security (DHS), the Attorney General, and the Director of National Intelligence (DNI), all in their official capacities, as well as the Department of Justice (DOJ), DOD, DHS, and CIA. The Court previously granted in part and denied in part Defendants' motion to dismiss for lack of standing and failure to state a claim upon which relief may be granted. Defendants now move to dismiss Mr. Kareem's remaining claims pursuant to the state secrets privilege arguing that the facts necessary for Mr. Kareem to establish his *prima facie* case or for Defendants to defend against his claims are classified and without disclosure of those facts the case cannot proceed. Having carefully considered the issues, this Court agrees.

I. BACKGROUND

The facts are described in detail in the decision on Defendants' first motion to dismiss, so they will be repeated here only as relevant. *See Zaidan v. Trump*, 317 F. Supp. 3d 8, 14-16 (D.D.C. 2018). After the Court permitted three of Mr. Kareem's claims to proceed, the parties discussed potential pretrial resolution. Despite two months of discussions, the parties were unable to resolve the litigation.[1] Mr. Kareem then asked to begin

[1] Defendants agreed to review a written submission from Mr. Kareem to consider if in fact a decision about whether to target him had been made or was contemplated. Mr. Kareem declined

discovery and Defendants notified the Court that they were considering a second motion to dismiss based on the state secrets privilege.

After considerable time, due to multiple motions for extension of time and an extensive government shutdown, Defendants filed a motion to dismiss pursuant to the state secrets privilege on January 30, 2019. Mem. in Supp. of Defs.' Mot. to Dismiss (Mot.) [Dkt. 24-1]. Mr. Kareem opposed. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss (Opp'n) [Dkt. 27]. Defendants replied. Reply to Pl.'s Opp'n to Defs.' Mot. to Dismiss (Reply) [Dkt. 28]. The motion is ripe for review.

II. LEGAL STANDARD

The United States is privileged to refuse to disclose information requested in litigation when "there is a reasonable danger" that the disclosure "will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). The privilege "is not to be lightly invoked," *id.* at 7, but "[c]ourts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (*Halkin I*) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

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and asked to review the information the Defendants already had in order to rebut it.

Review of an invocation of the state secrets privilege occurs in three steps. First, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8. Next, the Court must evaluate the basis for the privilege "without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8. The sensitivity of the privilege and the information at issue requires the Court to review declarations submitted, both publicly and *in camera*, to determine if the privilege is properly invoked. "[T]he court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure." *Id.* at 9 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951)). It is not necessary for the Court to examine the actual evidence at issue to make this determination. *See id.* at 9-10.

Finally, once the Court finds that there is a reasonable danger that disclosure of the information will expose military matters or harm national security, the Court must determine whether the case may proceed without the information or whether it is so entwined in the matter that the case cannot be litigated and dismissal is necessary. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1096 (9th Cir. 2010) (holding

that when "there is no feasible way to litigate [the defendant's] alleged liability without creating an unjustifiable risk of divulging state secrets," the case must be dismissed).

III. ANALYSIS

A. Did the Government Satisfy the Procedural Requirements to Invoke the Privilege?

The government has satisfied the three procedural requirements for invoking the state secrets privilege. First, the privilege was asserted by the United States government itself, not a third party. Second, the claim of privilege was made through a formal declaration by the heads of agency responsible for the information. Patrick M. Shanahan, then-Acting Secretary of Defense, and Daniel R. Coats, then-Director of National Intelligence, submitted formal declarations, both public and *in cameral ex parte*, explaining that they are the individuals responsible for the relevant information and invoking the privilege. *See* Ex. 1, Mot., Public Decl. and Assertion of Military and State Secrets Privilege by Patrick M. Shanahan, Acting Secretary of Defense (Shanahan Decl.) [Dkt. 24-2]; Ex. 2, Mot., Decl. of Daniel R. Coats, Director of National Intelligence (Coats Decl.) [Dkt. 24-3]. Third, Acting Secretary Shanahan and Director Coats both declared that they personally reviewed the relevant information and determined that invoking the state secrets privilege was warranted. *See* Shanahan Decl. ¶ 8; Coats Decl. ¶ 9.

B. Does the Information Qualify as Privileged?

"When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Due to the absolute nature of the privilege, "a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re United States of America*, 872 F.2d 472, 475 (D.C. Cir. 1989). The government is required to show that disclosure of "the information poses a reasonable danger to secrets of state." *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (*Halkin II*).

Other claims of privilege can be often overcome when the necessity presented by the requesting party outweighs the privilege, but such is not the case when state secrets would be disclosed. Instead, the degree of necessity "determine[s] how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)). "Therefore, the critical feature of the inquiry in evaluating the claim of privilege is not a balancing of ultimate interests at stake in

the litigation. That balance has already been struck. Rather, the determination is whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case." *Halkin II*, 690 F.2d at 990.

Mr. Kareem's claims involve allegations that the United States targeted an American citizen for lethal action in a foreign country without due process of law. His need for the information to prove his claims is unquestionably strong. Thus, "close examination of the government's assertions is warranted." *Ellsberg*, 709 F.2d at 63.

The government invokes the state secrets privilege to protect "the existence and operational details of alleged military and intelligence activities directed at combating the terrorist threat to the United States." Mot. at 6. Mr. Kareem specifically requests discovery into:

> (i) whether or not the United States has in fact targeted Kareem for lethal force and, if so, the facts on which the Government allegedly relied in reaching a purposed determination;
>
> (ii) what process the Government used to allegedly designate Kareem and, if he continues to be an alleged target, what the current targeting process is; and

(iii) whether or not the United States attempted to kill Kareem in the airstrikes alleged in the Complaint.

Id. at 6-7. Based on a review of the public and classified declarations, the Court finds that the information Mr. Kareen asks for constitutes privileged state secrets because "there is a reasonable danger" that disclosing such information would endanger national security. *Reynolds*, 345 U.S. at 10. "Detailed statements underscore that disclosure of [the privileged] information . . . and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." *Al-Haramain Islamic Found, Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007).

The government explains that disclosure of whether an individual is being targeted for lethal action would permit that individual to alter his behavior to evade attack or capture and could risk intelligence sources and methods if an individual learns he is under surveillance. *See* Mot. at 11. Acting Secretary Shanahan stated in his public declaration that disclosing classified information about targeted airstrikes could hinder the United States' military operations in Syria, *see* Shanahan Decl. ¶¶ 15-16, and disclosing whether the United States possesses information about a particular individual could alert them, allow them to seek to prevent further collection, and risk disclosure of intelligence sources and methods, thereby thwarting intelligence efforts. *See id.* ¶¶ 17-18. Director Coats similarly declared that: (1) disclosing whether the

United States targets terrorists abroad with lethal force "could reasonably be expected to cause harm to national security by alerting terrorists and terrorist organizations to specific means that the U.S. Government is using, or has chosen not to use, to combat terrorism," Coats Decl. ¶ 12; (2) confirming or denying whether Mr. Kareem has been designated for the use of lethal force could permit him to evade capture or further action by the United States, *see id.* ¶¶ 13-14; and (3) disclosing whether the United States maintains information about Mr. Kareem could "reveal the sources and methods by which such information was obtained, compromising the safety and effectiveness of those sources and methods." *Id.* ¶ 16.

Mr. Kareem raises four points against allowing the privilege to apply. First, he argues that the constitutional right at issue—his right to due process before the United States can take his life—is so paramount as to make the state secrets privilege inapplicable. Second, he asks the Court to consider alternative methods of protecting the information, such as use of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, § 1 *et seq.*, to ensure the classified information is not disclosed outside cleared counsel and the Court. Third, Mr. Kareem challenges the assertion that all of the information remains privileged because the United States has previously disclosed that U.S. citizens were targeted with lethal action. Finally, he differentiates his request for *ad hoc* relief—review of the alleged decision to target him with lethal action before the targeting is successful—with prior state secrets privilege

cases which requested *post hoc* relief—challenges to actions taken by the government which could not be further prevented or undone.

Mr. Kareem's first objection focuses on the significance of the right at issue—his right to due process, *i.e.*, evidence and argument before the United States can take his life. But the state secrets privilege is absolute. Invocation of the privilege has the "serious potential [to] defeat[] worthy claims for violations of rights that would otherwise be proved"; it is for this reason that "the privilege is not to be lightly invoked." *In re United States*, 872 F.2d at 476 (internal quotation marks and citations omitted); *see also In re Sealed Case*, 494 F.3d 139, 143 (D.C. Cir. 2007) ("[I]t hardly follows that the privilege evaporates in the presence of an alleged constitutional violation."); *Halkin II*, 690 F.2d at 1001 ("Although under this analysis there may indeed be illegal or unconstitutional actions which will go unchallenged in a federal court due to the lack of a proper party to bring suit, that is the result required here.") (internal quotation marks and citation omitted). Thus, the government did not rush to claim state secrets here, although it warned such secrets were at issue, it only filed the instant motion when the Court denied its first motion to dismiss. The Court finds that the government has not invoked the privilege lightly but has instead engaged in months of consideration before filing its motion supported by reasoned declarations from the heads of the agencies responsible for the information. Nonetheless, the significance of Mr. Kareem's allegations requires the Court to take a

thorough and questioning look at the reasons presented by the United States for invoking the privilege, but it does not erase the privilege altogether.

While no courts have previously addressed the state secrets privilege in the context of targeted killing, courts have addressed the privilege in cases involving other constitutional claims. The privilege has been invoked in cases involving warrantless surveillance, *see, e.g.*, *Mohamed*, 614 F.3d at 1073 (affirming dismissal of challenge to an alleged extraordinary rendition program of the Central Intelligence Agency due to the invocation of the state secrets privilege); *Al-Haramain*, 507 F.3d at 1205 (holding that the state secrets privilege prevented disclosure of classified information and without that information plaintiff could not establish standing to challenge his alleged surveillance; case remanded for consideration of the interplay between the state secrets privilege and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq*.); *Halkin II*, 690 F.2d at 981 (upholding dismissal of claims under the First, Fourth, Fifth, and Ninth Amendments, involving warrantless rendition and torture, due to the invocation of the state secrets privilege); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) ("Thus, while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interests must give way to the national interest in preserving state secrets."), *aff'd sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). In each of

those instances, invocation of the state secrets privilege was sufficient to prevent adjudication of the underlying constitutional claims and Mr. Kareem points to no legal authority that would permit this Court to hold differently in this case.[2]

Next, Mr. Kareem probes the limits of the state secrets privilege and likens his predicament to a criminal trial. Based on that analogy, he requests that this Court institute CIPA rules to protect the privileged information, rather than excluding it altogether.[3] In a criminal trial, the government may not withhold information that would be material to the defense even if it

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[2] Mr. Kareem proposes that persons placed on the Kill List should be provided the same procedural protections as organizations designated as terrorists by the State Department or Treasury. This Court is not the proper institution to adopt that proposal. *See Halkin II*, 690 F.2d at 1001 ("[W]here the Constitution compels the subordination of [plaintiff's] interest in the pursuit of [his] claims to the executive's duty to preserve our national security, this means that remedies for constitutional violations that cannot be proven under existing legal standards, if there are to be such remedies, must be provided by Congress. . . . [T]hat is where the responsibility for compensating those injured in the course of pursuing the ends of state must lie.").

[3] "In criminal proceedings under the Classified Information Procedures Act (CPA) . . . the government may move for alternatives to disclosing classified information, such as substituting 'a statement admitting relevant facts that the specific classified information would tend to prove' or 'a summary of the specific classified information.' The district court must 'grant such a motion if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.'" *Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (quoting 18 U.S.C. App. III, § 6(c)(1)).

is a privileged state secret; to do so would be to deprive the defendant of liberty without due process. The United States may either proceed with the indictment and disclose the information or forego prosecution by dismissing the charges. *See Reynolds*, 345 U.S. at 12 ("The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."). However, the Supreme Court has held when the government is not the movant in a civil case the rationale applied in criminal cases is not applicable. *See id.* ("Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.").

Mr. Kareem specifically equates his situation with a criminal capital case, where extra procedural protections are provided the defendant to ensure that punishment "is not meted out arbitrarily or capriciously." *California v. Ramos*, 463 U.S. 992, 999 (1983). He argues that before a criminal defendant may be subject to capital punishment he has the opportunity to review, and potentially dispute, "a fulsome record of the allegations and considerations that will be used against him." Opp'n at 5. He asks this Court for the same protections because he fears the United States military will kill him. Were the United States to choose to prosecute Mr. Kareem for his alleged involvement in

terrorist activities, the government would be required to disclose, with the relevant protections, any classified information that would be material to Mr. Kareem's defense. But Mr. Kareem is not a criminal defendant, he is a plaintiff in a civil suit against the United States, which setting renders the state secrets privilege absolute after it is properly asserted.

Third, Mr. Kareem challenges the legitimacy of the privilege because the United States has previously disclosed the existence of the Kill List and indicated that a United States citizen had been on the list. *See Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 59 (D.D.C. 2014) ("President Barack Obama and Attorney General Eric Holder, Jr., have admitted that the United States targeted and killed Anwar Al-Aulaqi, a terrorist who was a key leader of al-Qa'ida in the Arabian Peninsula."). Mr. Kareem challenges the legitimacy of invoking the state secrets privilege here since the United States previously determined that its security interests allowed the disclosure of a name on the Kill List. Contrary to Mr. Kareem's argument, the D.C. Circuit has already found that "[t]he government is not estopped from concluding in one case that disclosure is permissible while in another case it is not." *Halkin I*, 598 F.2d at 9. This Court concludes that a previous U.S. disclosure that an individual had been targeted for lethal action does not mean that it has waived its right, as a state secret, to refuse to disclose the who, why, and how it might identify future targets.

Finally, Mr. Kareem argues that the prospective nature of his case differentiates his dilemma from

previous cases dealing with the state secrets privilege that challenged actions already taken by the United States. He maintains that none of the cited cases "involved a prosecution of a U.S. citizen or any action analogous to a prosecution." Opp'n at 12. In this assertion he is correct: he is a U.S. citizen, voluntarily in Syria, reporting on the fighting by insurgents, and allegedly targeted by the United States without success so far. However, the applicability of the state secrets privilege has consistently been recognized in civil litigation against the United States even when a plaintiff was alleging violations of constitutional rights, which is exactly what the instant lawsuit entails. The Court understands the differences between this and prior cases but the similarities are controlling and require the same conclusion.

A court does not merely ratify the government's assertion of privilege willy-nilly. This Court has reviewed the declarations submitted by the government and carefully considered Mr. Kareem's claims and need for the documents, as well as the reasoning behind the privilege. Consistent thereto, the Court finds the state secrets privilege bars disclosure of the requested information to Mr. Kareem because disclosure would present a reasonable danger to national security.

C. May the Case Proceed Without the Privileged Information?

There is still a question as to whether the unavailability of the requested information is fatal to

Mr. Kareem's complaint. A court must dismiss a case in which a privilege of state secrets is sustained when: (1) disclosure is necessary for the plaintiff to make its *prima facie* case; (2) disclosure is necessary for the defendant to defend itself; or (3) further litigation would present an unjustifiable risk of disclosure. *See Mohamed*, 614 F.3d at 1087. The United States focuses on Mr. Kareem's *prima facie* case, arguing that Mr. Kareem cannot establish his standing to sue without the information. The Court agrees and notes that all three reasons justify dismissal. Because "there is no feasible way to litigate [the United States'] alleged liability without creating an unjustifiable risk of divulging state secrets," this case must be dismissed. *Id.* "[T]he claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable." *Id.* at 1089.

To prove his *prima fade* case, Mr. Kareem must be able to show he was in fact targeted by the United States with lethal force. The Court previously found Mr. Kareem alleged facts sufficient, if proven, to survive a motion to dismiss, but having now held that the government is not required to disclose whether Mr. Kareem has been targeted as alleged, it is impossible for Mr. Kareem to obtain the necessary information to prove his claims. Without access to the privileged information, Mr. Kareem is unable to establish whether he was targeted by lethal force or what information was considered in reaching the alleged decision to target him. Mr. Kareem is "incapable of demonstrating that [he has] sustained a violation of his constitutional

rights without the withheld information. *Halkin II*, 690 F.2d at 999. He "ha[s] alleged, but ultimately cannot show, a concrete injury amounting to either a 'specific present objective harm or a threat of specific future harm.'" *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972)). In this instance, in which the relevant information is solely in the control of the United States and is protected by the state secrets privilege, Mr. Kareem is left with no method to obtain it to pursue his case, which must therefore be dismissed. The same analysis applies to the government's ability to defend itself against the allegations and also requires dismissal.

When a plaintiff's *prima facie* case and a defendant's defenses are not affected by the state secrets privilege, a court must still dismiss if "any attempt to proceed will threaten disclosure of the privileged matters." *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 124142 (4th Cir. 1985). In that circumstance, the risk of disclosure alone leads to dismissal. The analysis applies here. The totality of the issues to be litigated surrounds the alleged decision to target Mr. Kareem but all such information is privileged as state secrets and will not be disclosed by the United States. "With no hope of a complete record and adversarial development of the [relevant] issue," *Halkin II*, 690 F.2d at 1000, the Court cannot even begin an inquiry. The Complaint must be dismissed.

IV. CONCLUSION

For the foregoing reasons the Court will grant Defendants' Motion to Dismiss pursuant to the State Secrets Privilege [Dkt. 24]. A memorializing Order accompanies this Memorandum Opinion.

Date: September 24, 2019

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BILAL ABDUL KAREEM, **Plaintiff,** **v.** **GINA CHERI HASPEL, Director of the Central Intelligence Agency, *et al.*,** **Defendants.**	**Civil Action No. 17-581 (RMC)**

ORDER

(Filed Sep. 24, 2019)

For the reasons stated in the Memorandum Opinion issued contemporaneously with this Order, it is hereby

ORDERED that Defendants' Motion to Dismiss pursuant to the State Secrets Privilege, Dkt. 24, is **GRANTED**.

This is a final appealable Order. *See* Fed. R. App. 4(a). This case is closed.

Date: September 24, 2019

/s/
ROSEMARY M. COLLYER
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5328 **September Term, 2020**

1:17-cv-00581-RMC

Filed On: April 20, 2021

Ahmad Muaffaq Zaidan,

Appellee

Bilal Abdul Kareem,

Appellant

v.

Joseph R. Biden, Jr., President of the United States, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson and Millett, Circuit Judges

ORDER

Upon consideration of appellant's corrected petition for panel rehearing filed on March 2, 2021, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Kathryn D. Lovett
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5328 **September Term, 2020**

1:17-cv-00581-RMC

Filed On: April 20, 2021

Ahmad Muaffaq Zaidan,

Appellee

Bilal Abdul Kareem,

Appellant

v.

Joseph R. Biden, Jr., President of the United States, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges

ORDER

Upon consideration of appellant's corrected petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Kathryn D. Lovett
Deputy Clerk

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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5 U.S.C. § 702

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the

United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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5 U.S.C. § 704

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise fonal is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile

is inoperative, for an appeal to superior agency authority.

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5 U.S.C. § 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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28 U.S.C. § 2072

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) ***In General.*** In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) ***Denials – Responding to the Substance.*** A denial must fairly respond to the substance of the allegation.

(3) ***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading – including the jurisdictional grounds – may do so by a general denial. A party that does not intend to deny all the allegations must either

specifically deny designated allegations or generally deny all except those specifically admitted.

(4) ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) ***Effect of Failing to Deny.*** An allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;

- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) ***In General.*** Each allegation must be simple, concise, and direct. No technical form is required.

(2) ***Alternative Statements of a Claim or Defense.*** A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative

statements, the pleading is sufficient if any one of them is sufficient.

(3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Federal Rules of Evidence

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AHMAD MUAFFAQ ZAIDAN; BILAL ABDUL KAREEM, Appellant, v. DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., Appellees.	No. 19-5328 Monday, November 16, 2020 Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE SRINIVASAN, AND CIRCUIT JUDGES HENDERSON AND MILLETT

APPEARANCES:

ON BEHALF OF THE APPELLANT:

TARA J. PLOCHOCKI, ESQ.

ON BEHALF OF THE APPELLEES:

BRAD HINSHELWOOD (DOJ), ESQ.

* * *

CONTENTS

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[3] PROCEEDINGS

THE CLERK: Case Number 19-5328, Ahmad Muaffaq Zaidan; Bilal Abdul Kareem, appellant versus Donald J. Trump, President of the United States, et al. Ms. Plochocki for the appellant. Mr. Hinshelwood for the appellees.

JUDGE SRINIVASAN: Ms. Plochocki, please proceed when you're ready.

ORAL ARGUMENT OF TARA J. PLOCHOCKI, ESQ.

ON BEHALF OF THE APPELLANT

MS. PLOCHOCKI: Good morning, Your Honors, and may it please the Court. This is a case of first impression in which the Government has argued that it may designate a U.S. citizen for execution without due process and insulate that decision from judicial review on the basis that it's a state secret. This represents a radical expansion of the state secrets privilege and the Fifth Amendment's guarantee of due process forecloses the Government's argument.

Mr. Kareem is a U.S. citizen and a journalist. He has rights. They are justiciable. And the Government does not have the discretion to bypass the Constitution by invoking a common law evidentiary privilege. Our position here is simple. An American citizen who demands due process upon discovery that he is a target of lethal action is entitled to notice of the basis for that action and an opportunity to challenge it. That is basic due process, and [4] no U.S. court has permitted less when a U.S. citizen has come before it.

JUDGE SRINIVASAN: Can I just take you to the question of standing for a second before we get into the teeth of the state secrets issue? And on standing, one key consideration that's pointed to is that at least one of the alleged strikes was a Hellfire missile.

MS. PLOCHOCKI: That's correct, Your Honor.

JUDGE SRINIVASAN: And that's in the complaint at page 49, I'm sorry, paragraph 49, I think, at JA-22. The vehicle Kareem and his staff was struck and destroyed by a drone-launched Hellfire missile, which seems to be a significant fact in your view because it more explicitly links it, that attack at least to the possibility that it was the United States.

And then I just noticed in your brief at page 9 that, your opening brief, and it says the strike came in the form of what appeared to be a Hellfire missile. And since it's a somewhat significant fact whether it's a Hellfire missile, I'm just wondering why the brief

frames it in terms of what appeared to be rather than the allegation in the complaint that it is.

MS. PLOCHOCKI: Your Honor, our brief did not intend to depart from the facts alleged in the complaint. In terms of saying it appeared to be a Hellfire missile, of [5] course it's impossible with any kind of certainty without having had an opportunity to move to the merits stage to prove that it was Hellfire missile, but Mr. Kareem does allege that it was a Hellfire missile.

JUDGE SRINIVASAN: So, then, can I ask you this question? Let's just, there are some issues about Hellfire missiles, the extent to which that says that it's the United States, that indicates that it's the United States as opposed to it could be somebody else. But if we take that one, that particular attack out of the field of vision just for argument's purposes. I understand that we're not taking it out, but let's just do it for argument's purposes. And what you have is the other four, would you still take the position that you've advanced past possibility to plausibility in terms of the United States being responsible for the missile attacks based on the other four alone?

MS. PLOCHOCKI: Absolutely, Your Honor. As we've alleged in our complaint, the United States uses signal intelligence and metadata in order to determine who to target for lethal action. In this case, the Government has admitted that it conducts lethal strikes in Syria, that it was doing so during the time that Mr. Kareem was struck. Mr. Kareem uses

signal-emitting devices, and he was struck, in your hypothetical, four times then, with incredible precision, not in the context of an ongoing battle, but four [6] unique strikes, including two on his office, two on his vehicle I think are the ones that would be –

JUDGE MILLETT: It wasn't his office. It was his employer's office.

MS. PLOCHOCKI: Well, On the Ground Network is constructively Mr. Kareem's operation.

JUDGE MILLETT: He's the only one?

MS. PLOCHOCKI: He's not the only person, no, but it's –

JUDGE MILLETT: Are there other –

JUDGE HENDERSON: Have you alleged that these were the only strikes made on those days? I don't see anything. You've painted a picture as if one missile hit on each one of these days. And I frankly think we could take judicial notice that in 2016, strikes were being conducted all over Syria, and certainly including where Mr. Kareem was.

MS. PLOCHOCKI: Your Honor, that certainly is possible, but it doesn't mean that the U.S. didn't undertake these strikes on Mr. Kareem deliberately. At the pleading stage, as you are well aware, Mr. Kareem is only required to allege one plausible version of facts. The Government is attempting to challenge the merits of our allegations. We'll have an opportunity to do that in discovery. If the Government wants to

prove that it was not the United States or that it was some other actor, it can do so. But the [7] facts, as alleged, must be taken as true at this juncture, and there's nothing –

JUDGE HENDERSON: We can't ignore reality. And frankly, it seems to me a spectacular delusion of some sort of grandeur that your client thinks that the United States was aiming for him when bombs and drones and missiles were hitting all over that country and millions of people were fleeing for their lives.

MS. PLOCHOCKI: But, Your Honor, in June of 2016, there are no other facts on the record that suggest that there were a flurry of drone strikes occurring in that month. That would require –

JUDGE HENDERSON: I go back to my question. Do we ignore reality?

MS. PLOCHOCKI: Your Honor, we don't ignore reality, but I think at this juncture, reality for June of 2016 in Aleppo, Syria has not been established on this record. And so it would require incorporating into the complaint facts that have not been alleged by Mr. Kareem and certainly facts that have not been raised by the Government. In fact, the Government's attempt to undermine the plausibility of Mr. Kareem's claim only shows that it's more plausible that he was targeted by the United States.

The Government says, for instance, well, the Assad regime executes journalists. But it doesn't say so

that it [8] did it by drone strikes. It also says that the Assad regime uses drones indiscriminately, but indiscriminate strikes is not what happened to Mr. Kareem here. These happened with eerie precision, and that's what's pleaded in our complaint. Now, if there were more facts on the record –

JUDGE MILLETT: Do you dispute that during June and July and August of 2016 Idlib province and Aleppo were under almost daily fire?

JUDGE HENDERSON: I'm sorry, Judge Millett, I can't understand what you're saying.

JUDGE MILLETT: Sorry. Do you dispute that under that, in June, July, and August of 2016, these particular parts of Syria in particular, Aleppo and Idlib, I think it's a province, were subject to routine and severe bombings?

MS. PLOCHOCKI: Your Honor, I –

JUDGE MILLETT: Do you dispute that fact?

MS. PLOCHOCKI: I have no basis to confirm that fact. I do know, of course, as does Mr. Kareem, that Syria was at civil war, and that strikes were undertaken, including the five on him.

JUDGE MILLETT: All right. I mean, like Judge Henderson, I remember the news. Right? Russia had come in at this point, and there were a lot of countries that were doing a lot of bombing. And Aleppo and Idlib Province were particularly being torn apart that

summer. And we're going, [9] I think you say one of the bombs happened in an area that had just switched control. They were going back and forth in control.

Now, if they're going back and forth in control between government and rebel forces, that means it's a very active war zone. And I get you, I just, I was surprised that you or your client wouldn't be familiar with that so that you're not able to. So I guess you dispute just what the on-the-ground reality in this part of the world was that summer?

MS. PLOCHOCKI: No, Your Honor. We do not dispute that there were drone strikes undertaken in Syria. Of course there was –

JUDGE MILLETT: Drones and bombs, and, because you don't –

MS. PLOCHOCKI: And bombs. It was a civil war zone, indeed.

JUDGE MILLETT: In this particular area, it was an intense, an area of intense fighting. As you said, as you allege as to one of them, it had just switched from government to rebel or rebel to government control.

MS. PLOCHOCKI: But I think the thing to remember in this case, Your Honor, as pleaded in the complaint, we set forth facts that show that Mr. Kareem was the target of these strikes, that is they hit his vehicle, they hit –

[10] JUDGE MILLETT: You say he was in the, you allege he was in the vicinity of the strikes.

MS. PLOCHOCKI: I believe that we allege they hit his office twice and his vehicles twice. And that's, that belies the notion that the strike was going after some other thing. You know, the fact that these landed on Mr. Kareem four times in June and once in August, I mean, taken together this is evidence that suggests that Mr. Kareem was the target. Moreover, Mr. Kareem was also engaged in activities that would suggest to metadata that he may have been involved in hostile activity.

JUDGE MILLETT: What do you mean by metadata? You use that a lot. The metadata that was referenced in the quotation you have was telephone metadata, which is not conversations, but who called who when.

MS. PLOCHOCKI: That's right, Your Honor. Former –

JUDGE MILLETT: I don't understand what the connection here is, that he uses a telephone?

MS. PLOCHOCKI: The former director – no, Your Honor. The former director of the CIA, General Michael Hayden, says that we kill people based on metadata. And we understand that to mean based on public documents that this is signal intelligence. That is, the U.S. uses devices that can track a cell phone's movements. Now, Mr. Kareem moved [11] back and forth interviewing rebels.

JUDGE MILLETT: I don't think tracking a cell phone's movements is metadata. That's just cell tower pinging.

MS. PLOCHOCKI: I think it depends on what's being used to track the cell phone's movements.

JUDGE MILLETT: Okay.

MS. PLOCHOCKI: We have –

JUDGE MILLETT: I didn't understand your connection with the metadata at all because it was talking about a very different context, and he never said we kill U.S. citizens with metadata. Mr. Hayden –

MS. PLOCHOCKI: That's exactly the point. Your Honor has exactly landed on the point that's of concern here. We're concerned with the erroneous deprivation of Mr. Kareem's life on the basis of signal intelligence that may have misinformed the U.S. Government about who exactly it had picked up.

JUDGE MILLETT: What do you mean on the basis of signal intelligence?

MS. PLOCHOCKI: Signal intelligence, that is if there is intelligence being conducted, which we have pleaded in the complaint that there are programs such as SKYNET that are able to latch onto a cell phone and follow someone wherever they go. That's how they determine who's a [12] courier. Had this been used for Mr. Kareem, it would see that he had gone to various rebel outposts and interviewed people.

Now, to someone who doesn't know that that's a U.S. journalist conducting interviews and then publishing them, that could look very suspicious. It's our contention that he was picked up by the signal intelligence, and it gave intelligence officers or agency heads the wrong impression about who he is. And in keeping with the concerns that animated Matthews v. Eldridge and Lockett v. Ohio where there's an erroneous, where risk of, where there's a risk of erroneous deprivation of a person's life or liberty interests, those interests must be addressed in a manner which affords that person due process. And that's all we're seeking here.

JUDGE MILLETT: The complaint alleges some bombings in June and July, or June and August, or July and August. And then seven months elapsed before the complaint is filed without any allegation of any attempted attacks at all. And we now know that four years had gone by with no attacks. In a complaint for injunctive relief, doesn't the plausibility standard require some showing that there's still a plausible risk of ongoing attacks?

MS. PLOCHOCKI: Well, Your Honor –

JUDGE MILLETT: It's seven months or four years by [13] the time a court, or longer, by the time a court would get around to looking at injunction? If you're pleading for injunction, you have to show some current risk at the time. And seven months had gone by with nothing happening.

MS. PLOCHOCKI: Well, Your Honor, we are not privy to how long the Government takes to execute

someone who is on the kill list. In the case of Mr. Anwar al-Awlaki, for example, we know that his designation was made sometime before 2010, and that he was killed in 2011. So there was at least –

JUDGE MILLETT: You don't know that – I'm sorry. Oh, okay. Go ahead. I'm sorry. Go ahead. Go ahead. I misunderstood you. Yes.

MS. PLOCHOCKI: So there was at least a year that went by before the Government executed him. During the pendency of this litigation, it's true that the Government has not undertaken a drone strike on him.

JUDGE MILLETT: No.

MS. PLOCHOCKI: And if the Government –

JUDGE MILLETT: No, no, no. I'm talking about the seven months before the complaint was filed.

MS. PLOCHOCKI: Your Honor, in that case –

JUDGE MILLETT: You can't blame that on the pendency of the litigation.

MS. PLOCHOCKI: Of course. Your Honor, in that [14] case I would say that based on the example that we're aware of of where the Government has targeted U.S. citizens, seven months appears to be a reasonable and even smaller amount of time than it has taken in the past when undertaking to execute someone on the kill list.

JUDGE MILLETT: Okay. And then my understanding is that Mr. Kareem has disappeared, that he was presumably taken by a terrorist group in Syria. For purposes of a complaint seeking injunctive relief – I mean, if you know otherwise, please tell me – seeking injunctive relief, do we need to know whether he's in a position to benefit from it?

MS. PLOCHOCKI: Well, Your Honor –

JUDGE MILLETT: What should we do about that fact that he seems to have been either taken hostage or, you know, I hate to suggest the worst, but one has to think about that.

MS. PLOCHOCKI: Your Honor, we have no reason to believe that Mr. Kareem has been killed. We do understand that he is in the custody of a rebel group. We don't think that allays any concerns about whether or not he is on the kill list. There's nothing to say that when he is released that the U.S. won't resume its attempt on his life. Moreover, the fact that he is in the same place makes it, you would think, easier to target him for death.

[15] But finally, I would say that if the Government, if there is a mootness issue, the Government can clarify that for us. It has the option to say we don't intend to kill Mr. Kareem. And if it does so, this entire case goes away. And its resistance to doing so is what prevents us from abandoning this action.

JUDGE MILLETT: That's a different point than what I was asking, so. Is he in a position where

he could participate in a process, that he requests this process to clear his name? Is there any way that he could participate in that?

MS. PLOCHOCKI: Your Honor, if the Government were to call him for deposition next week, we would have difficulty accommodating that request. But we don't have any reason to believe that –

JUDGE MILLETT: Right. So it's a proceeding – I'm just, I'm asking a very intentional, practical question. Could the proceeding that he wants out of this litigation go forward at this time, or do we need to wait?

MS. PLOCHOCKI: Your Honor, I believe the proceeding can go forward. He has representation. We have authority to proceed on his behalf. And when he is released from custody, if his testimony or something else is needed, he can willingly provide it.

JUDGE SRINIVASAN: Can I ask you a question about [16] the constitutional claims that are raised? So you have a Fourth Amendment claim in your complaint as to which the allegation is that there was an unlawful seizure.

MS. PLOCHOCKI: Yes, Your Honor.

JUDGE SRINIVASAN: Is that right? So, and is the argument there that there is a seizure by virtue of being allegedly put on the, the kill list?

MS. PLOCHOCKI: Yes, Your Honor.

JUDGE SRINIVASAN: And would that mean that you could bring a habeas claim? So in other words, if you've been seized, and part of where I'm going with this is that there is a line in Reynolds that says we draw a divide between criminal and civil cases. And one of the issues that's at the core of the viability of the state secrets privilege and what its implications are for this case is that, you know, do we treat this as a typical civil case, or do we treat this as something different from a civil case that's on the order of a criminal case, which is sort of your argument?

And I'm just wondering, like in Doe v. Mattis and Hamdi, those were habeas cases. And if you've got a Fourth Amendment seizure argument, could you bring a habeas petition?

MS. PLOCHOCKI: Your Honor, I don't think that would be the most appropriate claim in this posture because [17] he's not in the custody of the United States yet. In fact, the U.S. has chosen to bypass prosecution in the normal custodial, pretrial detention and instead move straight to summary execution.

JUDGE SRINIVASAN: So there's a gap between, I mean, if there's a seizure, there's a seizure at the hands of the United States. It's not at the hands of somebody else.

MS. PLOCHOCKI: Right.

JUDGE SRINIVASAN: But there's a gap between an allegation that someone's been seized and the allegation that someone's in custody?

MS. PLOCHOCKI: I think that's correct, Your Honor. But there's no form of –

JUDGE MILLETT: What if he was under a death sentence but released on his own recognizance? Isn't that effectively what, under your view, is going on here?

MS. PLOCHOCKI: Correct, Your Honor. But presumably in the case where there would be a death sentence, he would have enjoyed the due process to which he's entitled. He has not had the benefit of that.

JUDGE MILLETT: No, no. Just for purposes of Chief Judge Srinivasan's habeas, that you could bring a habeas action. You could essentially say I am under a death sentence. This is your theory, as I understand it, a deeply [18] unconstitutionally imposed death sentence would be your argument because I got no judicial process at all.

MS. PLOCHOCKI: Correct.

JUDGE MILLETT: No charge even. And the fact that I'm out on my own recognizance, I'm out on, walking around on my own doesn't mean I can't still challenge that Executive-imposed death sentence.

MS. PLOCHOCKI: Your Honor, he has challenged the Executive-imposed death sentence.

JUDGE MILLETT: In habeas. In habeas.

MS. PLOCHOCKI: In habeas –

JUDGE MILLETT: He's seized by the Government, and he wants to be seized, and this death sentence follows him wherever he goes, under your theory. And he's constantly subject to it. He couldn't do a habeas action?

MS. PLOCHOCKI: I suppose it's possible that he could do a habeas action, but that doesn't foreclose the relief that he's seeking here. He's chosen to bring a Fifth Amendment claim as well. And it's on that basis that he is insisting on disclosure of the basis for the designation on the kill list and an opportunity to challenge it.

And so, in this posture, the relief that he seeks is perfectly available to him. And the formalistic docketing distinction between civil and criminal is not dispositive of the relief to which he's entitled. In fact, [19] in U.S. v. Reynolds, the Court said that it would be unconscionable to allow someone who faced potential deprivation of liberty not to have the evidence against him. The same concerns, of course, animated Roviaro v. United States in which the Court said that the privilege must give way when the defense requires the evidence. The privilege is also given away, well, classified information is required –

JUDGE SRINIVASAN: If he sought damages for, if he brought a civil action and sought damages on the theory that being on, allegedly being on the alleged list causes ongoing distress and for which compensation is owed, then would you say that it's a formalistic distinction between civil and criminal?

MS. PLOCHOCKI: I would say that it would be a civil claim in which the case precedent clearly establishes the relief would not be allowed. This is different. He is seeking a Fifth Amendment life and liberty interest here. He's not looking for damages. And, in fact, that's something that I think distinguishes our case from other state secrets case that are civil.

In this case, he is seeking to interpose himself into a process that has resulted in his death sentence. It's very clear from case precedent that when these kinds of concerns animate the interests at issue, that due process [20] must be afforded. And that includes cases where national security is involved. In Hamdi v. Rumsfeld, a plurality of the Supreme Court said it would turn our system of checks and balances on its head if a U.S. citizen who came to a court couldn't avail himself of his due process rights, and that's all we're really seeking here.

As you well know, the Court reaffirmed that in Doe v. Mattis, a U.S. citizen is entitled to his rights even on a battlefield. And so in a case where Mr. Kareem's life is at stake, those rights are even more acute than they are when a liberty interest is at stake.

JUDGE SRINIVASAN: Okay. Let me make sure my colleagues don't have additional questions for you before we hear from the Government. And we will give you some rebuttal time.

MS. PLOCHOCKI: Thank you.

JUDGE HENDERSON: I don't.

JUDGE MILLETT: No.

JUDGE SRINIVASAN: Okay, thank you. Let's hear from the Government now, and we'll give you some rebuttal time, Ms. Plochocki. Mr. Hinshelwood.

ORAL ARGUMENT OF BRAD HINSHELWOOD, ESQ.

ON BEHALF OF THE APPELLEES

MR. HINSHELWOOD: Yes. Good morning, Your Honors, and may it please the Court, Brad Hinshelwood for the [21] Government.

I'd like to start where the Court started which is with standing in this case. Mr. Kareem has not alleged any facts that would actually link not only the United States to the specific attacks described in the complaint, but much less that Mr. Kareem is the actual target of those attacks. And we think that's plain just from looking at the terms of the complaint itself, which are framed extremely generally with no specific linkage to the United States at all and really resolve to a claim that anyone who has an electronic device who is sort of generating signals and is in the proximity of both explosions and rebels is therefore plausibly alleging they've been targeted by the United States.

JUDGE SRINIVASAN: So does the allegation of a Hellfire missile bring it closer to the United States?

MR. HINSHELWOOD: Your Honor, it's certainly true that's a missile system used by the United States. As you pointed out, it's not at all clear what the basis for that is. And in the reply brief at page 10 I point out they say, well, Mr. Kareem inferred that on the basis of the strength of the explosion, the specific language, because of its strength and the damage it caused. So, you know, again, even if that allegation is sort of the lone allegation that brings this any closer to the United States, that the [22] strength of the inferences that could be drawn from that allegation are not, are not particularly impressive, nor does it exclude the possibility of other actors being the relevant actors in this circumstance given the context in which all of this is occurring.

You're talking about a nation that is wracked by civil war. And as some of the Court's questions pointed out earlier. There's, you know, talking about areas sometimes where control has just changed hands, right, where there are other organizations that may have an interest in engaging in strikes in a particular area. And –

JUDGE SRINIVASAN: So, can I ask, is your argument on the fact that, we haven't crossed the line from possibility to probability. Is it based on the notion that yes there's enough here to say that he was being targeted but it's not clear by whom, or is it that there's not enough here to show that he was being targeted because there's just a lot of activity in the area during this time. And so even though you have what the plaintiff alleges is more than a random coincidence because

it's five attacks that are on or very close by, that's still not enough because of the degree of bombings that were taking place in the area during this two to three month period?

MR. HINSHELWOOD: Your Honor, to be clear, we think it's both that he hasn't alleged the United States was [23] involved in these attacks, and that he hasn't alleged enough to show that he was actually the target of these attacks.

And even without considering sort of the fact that these are areas of active hostilities, you can just, from the allegations in the complaint see, you know, Mr. Kareem is not the only individual present for any of these strikes or any of these attacks. Right? So two of them are alleged to have hit a building which contains the On the Ground Network offices apparently among other things. We're told the Ojian (phonetic sp.) office is in the basement and that, you know, there's more to the building than just that.

In other circumstances, he's, you know, interviewing people, he's sitting in a truck with numerous other, you know, near other individuals, he's on a street. He leaves the street, and then when he comes back there's just been an attack. So, you know, in all of these circumstances, he's not even the only person present, much less is there anything to suggest that he's actually the target of any of these specific attacks. And that's, you know, before you even get to the fact that we know that, you know, look, Syria is obviously engaged in an ongoing civil war, was in 2016 and continues to

be to this day. And that obviously plays a role in the sort of context of inquiry that this Court has to engage in for assessing the plausibility of allegations in a complaint. And so given [24] the lack of any factual matter that connects the United States to these attacks or suggests that Mr. Kareem was –

JUDGE MILLETT: Can I back up there, just. Let's assume it was a Hellfire missile. We'll take that fact or inference in the light most favorable to the plaintiff here. Does that tie it to – you've got your other arguments, but I just want to know does that tie it to the U.S. having done that bombing run, put aside the target issue?

MR. HINSHELWOOD: Right. So, it wouldn't link the United States to any of the other four, first of all.

JUDGE MILLETT: That's not my question.

MR. HINSHELWOOD: I understand. So it would work as, it would be, it would make it somewhat more likely that the United States was involved in that specific attack.

Now –

JUDGE MILLETT: Somewhat more likely, does that mean, how do we know that other entities or governments that were engaged in bombing in this area, that some were using Hellfire missiles? Is that –

MR. HINSHELWOOD: There's been no allegation the United States is the only entity that uses

missiles of that type. So even, again, crediting the idea that just based off the strength of the explosion we can conclude that this, that it was a Hellfire missile, even if you credit that, it doesn't necessarily lead to the conclusion or, you know, it [25] certainly doesn't compel the conclusion, and we don't think plausibly –

JUDGE MILLETT: Compel is not the test here.

MR. HINSHELWOOD: I understand.

JUDGE MILLETT: Does it move, on this narrow question of whether that one bombing run was connected by the, was conducted by the U.S., does it move that specific factual allegation from possibility to plausibility because it was a Hellfire missile.

MR. HINSHELWOOD: Your Honor, I don't think it would move it even into plausibility. But that's, of course –

JUDGE MILLETT: Because –

MR. HINSHELWOOD: – your question has assumed that we're setting aside the question of whether in that particular attack Mr. Kareem was the target. Right? So even if –

JUDGE MILLETT: Correct. I'm just, I really would like a straight answer on the narrow fact of whether that was a U.S. bombing run, which there are other facts that have to be added in. Let's put those aside. Just on whether that was a bombing run by the U.S. Does crediting the allegation that it was a Hellfire

missile move that particular factual allegation, it was conducted by the U.S., bombing run conducted by the U.S. from the realm of [26] possibility into plausibility? And if not, why not?

MR. HINSHELWOOD: Your Honor, I think where there's no allegation, and couldn't be, frankly, an allegation that the United States is the exclusive user of this particular type of weapon –

JUDGE MILLETT: Just user in that area. Of course, that's what's relevant is the exclusive user in that area at that time.

MR. HINSHELWOOD: Right. There's also no allegation to that effect either. If there were an allegation of that type, again, you might be inching closer with each sort of piece of specificity you can provide. But where this –

JUDGE MILLETT: I think they do. I mean, I think they definitely allege, that's why they, that's their evidence that it was the U.S. that did it because this is their bomb.

MR. HINSHELWOOD: Right, that based on the strength of the explosion, he assumes it was a Hellfire missile that was launched from a drone –

JUDGE MILLETT: A U.S.

MR. HINSHELWOOD: Right, so you know, again –

JUDGE MILLETT: A U.S. missile, sorry, but yes.

MR. HINSHELWOOD: Right. Assuming the sort of, the full chain of inferences that get you to that point, [27] then, is certainly more likely at that point that that specific allegation would get you to the claim that the United States engaged in that particular attack. There's no question that makes it more likely. Now, whether or not it makes it plausible, you know, our position would be still no in that circumstance given the lack of allegations that support anything more here. But of course, you know, your question has assumed and asked me to set aside this sort of –

JUDGE MILLETT: Yes, I'm not (indiscernible) all that stuff is there.

MR. HINSHELWOOD: Absolutely.

JUDGE MILLETT: I'm trying to figure out what to do with the Hellfire allegation.

MR. HINSHELWOOD: Well, Your Honor, even there, I think the simplest way to deal with it is if you think that would suffice for plausibility at the pleading stage to show that the United States engaged in that particular strike, and we've discussed we don't think that's right. But if you think that's true, then he would still have to show plausibly that he was the target of that one particular attack. And there's nothing alleged that supports that inference. We know for a fact there were other individuals present. He talks about there's another truck from On the Ground Network sitting nearby. You know, they're there for, [28] you know, other, to engage in sort of whatever journalistic activities they were there to engage in. So, you

know, there are other individuals in the area. So to suggest that that's a plausible allegation that he's been targeted by that particular attack, there's nothing to support that either.

JUDGE HENDERSON: And there's no allegation that this was the only Hellfire missile on that particular day.

MR. HINSHELWOOD: Right.

JUDGE HENDERSON: In other words, there could have been 20 of them dropping.

MR. HINSHELWOOD: Right. There's no sort of information provided in the complaint about –

JUDGE HENDERSON: As far as targeting. That's what I'm talking about, the targeting.

MR. HINSHELWOOD: Right. I mean, all we're told in the complaint is just specifically that, you know, he was there. He saw a drone at some time before the explosion, sometime later, there was an explosion which he assumes to be from a Hellfire missile because of the strength of that explosion. And that's the sum and substance of the allegation there. We don't have any other additional information on that score.

JUDGE SRINIVASAN: Can I take you to the merits for a second, to the state secrets question for a second, [29] unless there's further questions on standing? So on state secrets, it seems to me a lot of the force of a state secrets assertion made by the Government here and what affect it has on a case turns on

whether we treat this as a civil case or a criminal case, or, as something that is somewhere in between but for various considerations, we ought to give it the rubric of one or the other.

And what do we do with a situation in which it's not a garden variety civil case because it's not seeking ex post compensation for a civil wrong that was imposed at prior time. It's also not a garden variety criminal case because the Government's not seeking to prosecute somebody. But it is a situation in which the allegations are that someone's been placed on a list for targeted killing by the United States. And so that is a context in which there's United States authority being visited on somebody in the nature of a criminal, the consequence of a criminal proceeding if it were a capital case. And so does it seem fair to you, then, just to treat that as a garden variety civil case, given that this is the context we're talking about?

MR. HINSHELWOOD: I think it makes sense to treat it as a civil case for a couple of reasons. One is that what this Court has recognized and what the Supreme Court has explained in Reynolds is that there are important [30] differences between civil and criminal cases. And that sort of the initiating party in these cases matters in significant ways. And that's not to dispute that, you know, Mr. Kareem has an important interest in these cases. But as this Court has explained in cases like Halkin II, where what the plaintiff is essentially asking the Court to do is balance the importance of their own interest against the Government's interest in maintaining state secrets, that's

not an appropriate inquiry for application of the privilege.

That inquiry goes to the sort of detail and the care with which the district court is required to scrutinize the Government's indication of the privilege because the privilege itself is absolute. And that's because, as I was referencing a moment ago, when the Government is sued it doesn't have the same control over the case that it does when it brings a criminal prosecution. Right? The rationale of those cases, as Reynolds explains is that there the Government, in criminal cases, the Government has the ability to protect information and to make judgments in the course of charging those cases and prosecuting those cases that it cannot make when it's brought to suit by another plaintiff.

So in these circumstances, and I think Mr. Kareem's reply brief is very honest about this, it's simply asking, I want you to balance my interest against the [31] Government's interest and create a new rule. That's exactly what this Court has said in cases like Halkin you don't do. The privilege exists, and it applies in these circumstances, and that it goes to the way we scrutinize the claims, the claim of privilege.

And the district court here did that, said it was carefully examining the Government's declarations to determine whether the occasion for invoking the privilege was appropriate. It correctly made that determination, you know, for all of the reasons we've explained and that are apparent I think both in the public and the classified declarations. And in that circumstance,

the privilege applies. That's how the privilege operates in these cases.

JUDGE SRINIVASAN: So one response to that is that it's not the classic situation in which the Government's just responding to a lawsuit that's brought against it because the offensive move that the Government made is in the allegation that it put Kareem on the list. And then once Kareem, and we take that allegation to be true for present purposes. Once that has happened, then there's no, it's not as if it's a responsive offensive case to then bring a civil suit. It's just that this is all I have left to do. I've got to figure out some way to try to extricate myself from this predicament I'm in because I think it's just, it's just wrongly founded.

[32] MR. HINSHELWOOD: Your Honor, I mean, I think the same type of move could be made as to any sort of claim that seeks prospective relief. So if, for example, somebody thought they were a target of surveillance and didn't believe that surveillance was appropriate, you know, in that circumstance, they could come in and say, well, you know, the Government has made the first move. It started to surveil me. And in this context, all I can do is bring a civil suit. So, you, please –

JUDGE MILLETT: Well, let's just say death is different, as the Supreme Court has said many times. And the Government is actually trying, taking the allegations here, there's two, the Government is actually trying to kill him. What's he supposed to do? And

let's say the Government's made, hypothetically, as he says, a serious mistake. What is he supposed to do?

MR. HINSHELWOOD: Well, Your Honor, in that circumstance, it's not that the state secrets privilege would no longer apply because, again, the type of, the seriousness of the interest, and again, no one's disputing the seriousness of Mr. Kareem's interest, is the way it functions under the privilege is to calibrate the inquiry. But as this Court explained in Halkin as well, when there are, you know, allegations of serious issues that can't be addressed as a result of the invocation of state secrets [33] privilege, the correct recourse is to the political branches, right, is to ask Congress to engage in some sort of creation of a process, something like that. It's not –

JUDGE MILLETT: Sorry, he's supposed to try and get a bill passed, and then the Executive Branch would say Congress can override the Executive Branch's judgment about state secrets? That's your position?

MR. HINSHELWOOD: Your Honor, exactly the contours of what Congress could or could not do in this area would be –

JUDGE MILLETT: No, no, no, no. Come on. Come on.

MR. HINSHELWOOD: Your Honor –

JUDGE MILLETT: That's, so you're targeting me to kill me without any process. And let's say I've gotten past standing. My car keeps blowing, I'm here

in the U.S. and my car keeps blowing up and I keep getting shot at. And I say the only explanation for this is I'm on a kill list by the U.S. Government. And let's also assume hypothetically that I actually am on a kill list by the U.S. Government. And the Government's position is touch luck. You have no rights. You have no capacity to get yourself off that list. I mean, you can write letters to the Government.

MR. HINSHELWOOD: Your Honor, I think –

JUDGE MILLETT: But that's it. The Government may [34] execute me, and there's nothing anyone, I can do to stop it or anyone can do about it.

MR. HINSHELWOOD: Your Honor, I think it's important to tease the Court two different things that I think are in your question. So one is, I think part of your question is getting to some of the political question doctrine issues in this case, which we –

JUDGE MILLETT: I'm just asking you is that your position that there's nothing I can do about it? That's just a bottom-line question.

MR. HINSHELWOOD: Excuse me, an individual in Mr. Kareem's position?

JUDGE MILLETT: My position. I'm on the kill list under this question.

MR. HINSHELWOOD: Okay. So an individual on the kill list, you know, hypothetical kill list overseas –

JUDGE MILLETT: Oh, no, no. Under my hypothetical, I am actually on the kill list.

MR. HINSHELWOOD: Right.

JUDGE MILLETT: I suspect I am, and it turns out I am.

MR. HINSHELWOOD: Okay. In that circumstance, whether the Government both for reasons of a court's competence to adjudicate those kinds of questions, which gets to the political question issues, and the Court's [35] ability to adjudicate claims where the Government has properly invoked the state secrets privilege, and a court has properly determined that the Government has invoked that privilege, then –

JUDGE MILLETT: Then the answer is there's nothing I can do about it.

MR. HINSHELWOOD: There's no recourse you can get from –

JUDGE MILLETT: There's no difference between my, for your political question theory, there's no difference between me and Mr. Kareem.

MR. HINSHELWOOD: If we're talking about, you know, a U.S. citizen who is in Syria –

JUDGE MILLETT: No, no. No, no. I don't understand why from political question. There's nothing in your briefing that says it turns on his location. So I'm extending it to someone on U.S. soil. Nothing in your briefing turns on where his location is at all. If

that's a factor now, you can tell us. But I assume it's not for state secrets.

MR. HINSHELWOOD: Certainly not for state secrets, no.

JUDGE MILLETT: All right. So then what, so you would still argue political question, just as you do here. And you would argue state secrets just as you do here. And [36] if we rule for you, that means I'm hosed. Nothing I can do about this death sentence.

MR. HINSHELWOOD: Certainly as to the state secrets privilege. What that, the invocation of the privilege in this particular case means that the case cannot proceed. Now, again, whether that could be different –

JUDGE MILLETT: Not just that – no, no. What difference? What difference is it if me rather than Mr. Kareem and I'm here in the U.S.?

MR. HINSHELWOOD: Your Honor, I'm sorry. I don't want to suggest that there's, just to speak about how the privilege applies in these cases, if your question is can a court once the privilege is properly invoked, which is an absolutely privilege that the Government is able to invoke in this litigation, can a court then proceed to adjudicate the merits nevertheless or disregard the Government's application of the privilege, an invocation of the privilege in that circumstance, the answer is no.

Now, as a result, as this Court explained in Halkin, the result may be that meritorious constitutional claims don't get litigated, and that the consequences –

JUDGE MILLETT: This is killing U.S. citizens. That's quite a power to say that the Executive Branch has and it's absolutely unchecked. There's no capacity whatsoever for judicial review, for a habeas action, or this [37] type of civil action which is a functional equivalent of a habeas action. There's nothing whatsoever. There's no precedent for that. You've got precedent generally on state secrets, but you've got nothing that says executing U.S. citizens, my hypothetical is on U.S. soil. This case involves not on U.S. soil.

MR. HINSHELWOOD: Your Honor, certainly there is no specific case that has addressed this specific type of claim. But the point is that the privilege itself, the very premise –

JUDGE MILLETT: No –

MR. HINSHELWOOD: – the rationale of the privilege –

JUDGE MILLETT: Do you appreciate how extraordinary that proposition is, that the U.S. Government can, the Executive Branch can unilaterally decide to kill U.S. citizens, and you've given me no basis for distinguishing it even here on U.S., that power existing even here on U.S. soil without any process whatsoever. That would make a lot of things a lot easier.

MR. HINSHELWOOD: Your Honor, I don't mean to suggest that the analysis, if you were

adjudicating such a case, would be different as to a person on U.S. soil. You know, we obviously haven't –

JUDGE MILLETT: Right. You don't think –

[38] MR. HINSHELWOOD: – addressed that question here. My point is simply that as to the state –

JUDGE MILLETT: Is there anything in your arguments that would change based on whether it's U.S. soil? I didn't see anything at all that turned on that.

MR. HINSHELWOOD: Your Honor, we certainly didn't –

JUDGE MILLETT: Is it less of a political question if it's on U.S. soil in your theory?

MR. HINSHELWOOD: Your Honor, you know, whether or not there would be some differences, I simply don't have the, you know, we haven't had to address any of that at this point. But I take your questions to get to a significant concern that obviously engaging in a strike of this nature is a serious undertaking. And there's no question that's true. And the Government absolutely agrees that in this circumstance the district court has an important role to play in taking a careful look at the Government's assertion of the privilege to ensure that it is appropriate in the circumstances.

JUDGE SRINIVASAN: May I ask this question –

MR. HINSHELWOOD: And there was no question –

JUDGE SRINIVASAN: Can I ask this question? So in Hamdi, if the Government, there was no state secrets assertion in Hamdi. But if the Government had asserted the [39] state secrets privilege, would the result have been that the habeas case goes away and that the detention authority continues to exist?

MR. HINSHELWOOD: Your Honor, I'm not sure how that would have sort of played out in those circumstances because, remember, it's dependent on the specific facts that are and information that is removed from the case on the basis of the privilege. So here, Mr. Kareem cannot demonstrate even his standing without information covered by the privilege, or, nor for that matter can, it can be demonstrated whether or not he has standing at all. So or not he's on the, was the target of the –

JUDGE SRINIVASAN: Right. I guess I'm just hypothesizing a situation in which the Government would say that we can't get into whether, we can't get into the bona fides of the determination that Mr. Hamdi's an enemy combatant because if we did that, then it would reveal too much, and there's military secrets in play, and the proceeding just can't go forward in any way that would allow us to shed light on the decision-making there. And therefore, it's a military secret under Reynolds, and therefore the proceeding just stops. It's not criminal. It's civil because habeas is a

petition that's filed by the detainee not an inquiry that's launched by the Government. And therefore, there's nothing further, we just continue to [40] detain.

MR. HINSHELWOOD: Your Honor, again, if the sort of occasion for invocation of the privilege is appropriate, then the consequences that flow from that are the consequences that flow from that. But of course, as we know, in the habeas context, the Government has proposed to the district court, and then ultimately has proceeded to litigate under certain protections those habeas petitions, over the last decade. But –

JUDGE SRINIVASAN: Without ever asserting the state secrets privilege as far as I know. Is that, I'm not aware of, I could be wrong about that, but I'm not aware of it.

MR. HINSHELWOOD: Right. It's not asserting the state secrets privilege in that context. Now, all that goes to show is that those cases don't have much to say about what happens when the Government does properly invoke the privilege. And we know what the answer to that question is because of the Supreme Court's decision in Reynolds, and all of this Court's cases which have repeatedly echoed the basic premise that the particular strength of the interest goes to the scope of the inquiry and not to the availability of the privilege in the first instance.

JUDGE SRINIVASAN: Okay, thank you. Let me make sure my colleagues don't have further questions for you, Mr. [41] Hinshelwood.

JUDGE MILLETT: Do you think there's any reason, since he seems to be in the custody of a terrorist organization, should that affect us going forward with this case since it's a case just for injunctive relief?

MR. HINSHELWOOD: Your Honor, I don't know the details of Mr. Kareem's present situation, and so I'd be hard pressed to provide any guidance on that. You know, obviously his counsel would be better positioned to give you whatever his current status is.

JUDGE SRINIVASAN: Thank you, Mr. Hinshelwood. Ms. Plochocki, we'll give you your two minutes of rebuttal.

ORAL REBUTTAL OF TARA J. PLOCHOCKI, ESQ.

ON BEHALF OF THE APPELLANT

MS. PLOCHOCKI: Thank you, Your Honor. I think the Government's argument has just made pretty clear that there are no circumstances under which it would permit a U.S. citizen to challenge his designation on the kill list. In order to have standing, the Government seems to think that Mr. Kareem needs to provide the make and model of the missiles fired at him. Of course, that's not a reasonable expectation. In the circumstances that he is in, he has provided all of the circumstantial evidence that's available to him to make his claim. The case law says that when a plaintiff alleges, as Mr. Kareem has done here, that [42] discovery will reveal additional evidence, and all of the other relevant evidence is in possession of defendants that he has pleaded facts sufficient to support standing.

Moreover, the Government's argument that this is a political question is deeply disturbing, as this Court has recognized in El Shifa and Al Jaber, the Court was asked to review the merits and the wisdom of military judgments. This is an ordinary due process claim, and the Court has a role to play here as it would in any other due process scenario. It's a purely legal issue, and the Government has offered no limiting principle, as this Court has observed on whether and when it can kill U.S. citizens. So whether that's in a parking lot in the United States or abroad in Syria, the Government has claimed for the first time ever in this case that it has unfettered and unreviewable discretion to kill U.S. citizens at will.

If the Court adopts the Government's argument, that would ultimately extinguish the Fifth Amendment due process right that any U.S. citizen has. So we request that this Court remand to the district court with instructions to proceed to discovery.

JUDGE SRINIVASAN: Thank you, counsel. Thank you to both counsels. We'll take the case under submission.

(Whereupon, the proceedings were concluded.)

[Digitally Signed Certificate Omitted]