IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, on his own behalf and as next friend acting on behalf of ANWAR AL-AULAQI Plaintiff, v. BARACK H. OBAMA, President of the United States; ROBERT M. GATES, Secretary of Defense; and LEON E. PANETTA, Director of the Central Intelligence Agency, Defendants.	Civ. A. No. 10-cv-1469 (JDB)

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff's opposition fails to demonstrate that there is any basis on which this Court may appropriately grant the declaratory and injunctive relief he seeks. As an initial matter, plaintiff fails to demonstrate that he has met the constitutional requirements for standing to bring this suit on behalf of his son, Anwar al-Aulaqi. Plaintiff offers no meaningful response to the fact that his son—an operational leader of al-Qaeda in the Arabian Peninsula (AQAP)—could avoid the alleged threat of lethal force at issue in this case by coming forward peacefully. Plaintiff's argument boils down to an assertion that Anwar al-Aulaqi should be entitled to the benefits of the justice system without making any effort to access the courts on his own behalf. Article III standing requirements foreclose this assertion under any theory of standing plaintiff advances, including his new (and erroneous) assertion of "third party" standing.

Plaintiff's allegation of injury, which is based on sheer speculation, is also insufficient for Article III standing. Plaintiff's alleged injury is *not* that his son may be killed; indeed, plaintiff concedes that the Government could target his son in certain circumstances. Instead, the entire premise of plaintiff's suit is that the Government is allegedly targeting his son without regard to legal standards that plaintiff claims would apply to such force—in particular, that his son must pose an imminent threat and there are no reasonable alternatives to lethal force. But, without confirming or denying any of plaintiff's allegations, there is no basis for assuming Executive officials have authorized the use of force in violation of the legal standard plaintiff seeks and, thus, no basis for granting the injunctive and declaratory relief that he requests.

Plaintiff's Complaint must also be dismissed because there simply is no basis in law, logic, or history that would permit courts to issue binding directives to the President or his senior military and intelligence officers *before* military or intelligence action overseas is undertaken,

when complex and time-sensitive determinations concerning the imminence of a terrorist threat and the necessity of action are at issue. Plaintiff's attempt to impose this *ex ante* and continuing judicial oversight of sensitive and fact-intensive military and intelligence judgments is both unprecedented and unwarranted.

Plaintiff mischaracterizes defendants' argument to be that "[n]o court should have any role in establishing or enforcing legal limitations on the Executive's authority to use lethal force against U.S. citizens whom the Executive has unilaterally determined to pose a threat to the nation." *See* Opp. (Dkt. 24) at 1. This case does not raise any such broad question. To the contrary, defendants have carefully tailored their argument to the particular circumstances and specific claims raised in this lawsuit. Defendants do not assert the "unchecked" right to impose an "extrajudicial death sentence" against any U.S. citizen whom the Government deems to "pose a threat to the nation." *See id*. at 1. Rather, defendants contend it would be inappropriate for this Court to issue the *ex ante* declaratory and injunctive relief sought against the President or his senior military and intelligence officials with respect to the possible use of force overseas against a terrorist organization as to which the political branches have authorized the use of necessary and appropriate force. The Court should dismiss plaintiff's request for such unprecedented relief as a non-justiciable political question. At the very least, the Court should exercise its discretion not to enter the relief sought.

Finally, as set forth below, plaintiff fails to demonstrate that he may proceed in his own right pursuant to the Alien Tort Statute. In addition, while the Court need not reach the Government's assertion of the state secrets privilege, plaintiff's challenge to the privilege assertion in the circumstances of this case is without merit.

I. PLAINTIFF LACKS STANDING UNDER ANY THEORY.

A. Plaintiff Has Not Demonstrated Next Friend Standing.

Plaintiff's opposition fails to establish two prerequisites for next friend standing: that Anwar al-Aulaqi lacks access to the courts, and that he is interested in bringing this legal action. As defendants have stated, without confirming or denying any allegation, plaintiff's son could access the courts on his own behalf—indeed, he could foreclose the alleged threat of lethal force against him—if he surrenders or otherwise presents himself to the proper authorities in a peaceful and appropriate manner. Plaintiff incorrectly contends that such a course is tied up in a merits dispute as to whether an "armed conflict" exists in Yemen, or whether Anwar al-Aulaqi has been indicted for a crime. Neither issue is relevant to the question of whether plaintiff can assert standing on his son's behalf. Rather, to address (and moot) the claims raised *in this lawsuit*—the alleged use of lethal force—plaintiff's son can come forward.

Plaintiff raises a new and broader objection not at issue in this case: that his son cannot access the courts because he might be *detained* if he comes forward. *See* Opp. at 14. That Anwar al-Aulaqi, an operational leader of AQAP, may wish to avoid possible legal consequences of coming forward is his own choice,[1] but he does not lack access to the courts to challenge the alleged threat of lethal force here, and he should not be free to avail himself of the benefits of the U.S. courts without accessing them himself. The test for next friend standing is not, as plaintiff

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[1] Anwar al-Aulaqi has stated in a videotaped interview distributed by AQAP in May 2010 that "[t]here were negotiations in the past with the Yemeni government about turning myself in, but I categorically rejected this . . . . The same goes for the Americans. I have no intention of turning myself in to them. If they want me, let them search for me." *See* Public DNI Clapper Decl. (Dkt. 15-2) ¶ 16, (transcript available at http://www.memritv.org/ clip_transcript /en/2480.htm, video available at http://www.memritv.org/clip/en/2480.htm).

states, merely whether "some impediment" exists to a party's bringing a suit, Opp. at 8, but whether "the real party in interest is *unable* to litigate his own cause." *Whitmore v. Arkansas*, 495 U.S. 149, 150 (1990) (emphasis added). Anwar al-Aulaqi is able to litigate his own cause but chooses not to do so, and therefore his father lacks next friend standing to act on his behalf.[2]

Plaintiff also fails to demonstrate that he is acting in his son's interests. Indeed, since the Government's opening brief, the media arm of AQAP, al-Malahim Media Production, has published another lengthy statement written by Anwar al-Aulaqi. In that article, which appears in the October 2010 edition of the AQAP publication "*Inspire*" (but was purportedly written in April 2010), Anwar al-Aulaqi asserts that international and civil law, including the rulings of civil courts, do not bind Muslims.[3] This further publication of Anwar al-Aulaqi's statements by AQAP, coupled with the videotaped interview that AQAP released in May 2010, *see* Public DNI Clapper Decl. ¶ 16, and an article written by Anwar al-Aulaqi for the July 2010 issue of *Inspire*, *see* Exhibit 2 hereto, casts serious doubt on plaintiff's assertion that his son is unable to communicate his wish to file a lawsuit against the United States (or to communicate that he wishes to present himself peacefully to authorities),[4] and, thus, on whether plaintiff is acting in

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[2] Moreover, as defendants have explained, next friend standing has not been recognized outside of the habeas context with respect to a mentally competent adult. *See* Defs. Mem. at 12. Plaintiff fails to cite a single case where next friend standing has been recognized on behalf of a real party who was not detained, a minor, or mentally incompetent.

[3] *See* Exhibit 1 hereto, Excerpt from the Fall Issue of *Inspire*; *see also* Steven Stalinsky, Middle East Media Research Institute, Inquiry & Analysis Series Report No. 638: Second Issue of Al-Qaeda in the Arabian Peninsula's (AQAP) "Inspire" Magazine: A General Review (Oct. 13, 2010), http://www.memri.org/report/en /0/0/0/0/0/0/4670.htm (last visited Oct. 17, 2010).

[4] Indeed, the July 2010 article, which calls for the death of an American cartoonist, concludes that people "may contact Shaykh Anwar through any of the emails listed on the contact page." *See* Exhibit 2 hereto, Excerpt from the Summer Issue of *Inspire*.

his son's interests. Plaintiff's contention that Anwar al-Aulaqi's "public silence with respect to the present lawsuit supports an inference in his favor," Opp. at 10, stands plaintiff's burden on its head. A next friend does not have standing to pursue a lawsuit so long as the real party in interest remains silent about the case (or issues no statement "disavowing or condemning" it). Rather, a next friend is required to establish affirmatively that the real party lacks access to the courts and would support the action filed on his behalf. Mere silence does not carry that burden.

B. Plaintiff Has Not Demonstrated Third Party Standing.

Plaintiff seeks to circumvent the requirements of next friend standing by belatedly asserting that he has third party standing to pursue claims on his son's behalf.[5] This contention is meritless. A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quotation omitted). This restriction "arises from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" *Miller v. Albright*, 523 U.S. 420, 446 (1998) (O'Connor, J., concurring) (*quoting Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) (opinion of Blackmun, J.)). The Supreme Court has stated that "this fundamental restriction on judicial authority admits of certain, limited exceptions" that apply, unlike here, where a plaintiff has independent standing to sue and special considerations counsel in favor of allowing the plaintiff to also assert the rights of third parties with the same interests. *Edmonson*

[5] Notably, plaintiff did not mention third party standing prior to filing his opposition brief. His complaint avers plaintiff acts "as next friend to his son," Compl. ¶ 9, and states he pursues Claims 1, 2 and 4 "as next friend for his son," Compl. ¶¶ 27, 28, 30. Plaintiff's declaration declares: "I act on my own behalf and as next friend to my son." Nasser al-Aulaqi Decl. ¶ 1.

v. Leesville Concrete Co., 500 U.S. 614, 629 (1991) (citation omitted); *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991) (criminal defendant may assert rights of jurors under third party standing principles where discriminatory peremptory challenges causes him "cognizable injury" that he is independently entitled to redress).

Specifically, "a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury" – *i.e.*, that the litigant has independent standing to sue—and also "that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Edmonson*, 500 U.S. at 629. Because the third party standing doctrine of *Edmonson* and *Powers* applies only where a litigant also has independent standing to sue, it is significantly different from next friend standing and cannot be invoked solely as an attempt to loosen the "access to court" requirement of next friend standing.

Plaintiff cannot establish third party standing because he neither alleges nor argues that he has an independent constitutional claim, and (as set forth below) he has no valid cause of action pursuant to the sole statutory claim he raises on his own behalf under the Alien Tort Statute (ATS). Conflating next friend and third party standing, plaintiff focuses solely on whether the alleged threat to his son and deprivation of his son's companionship establish the kind of injury that would give him a concrete interest in the outcome of this case. *See* Opp. at 11-12. But the threshold question for third party standing is not simply whether plaintiff's interests are aligned with those of his son, but whether his own alleged injuries are independently "redressable."

Edmonson, 500 U.S. at 629.[6] Plaintiff cannot satisfy this threshold requirement because he brings the constitutional claims at issue here solely in a representative capacity.[7]

The Supreme Court has also recognized third party standing when a law directly and deliberately interferes with a relationship between the litigant and third party, such as in the privacy context, where doctors can assert the rights of their patients. *See, e.g.*, *Singleton*, 428 U.S. at 117-18.[8] In this narrow class of cases, the requisite injury to the third party exists because the governmental program or action that has been challenged specifically targets a protected

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[6] *See also Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (where plaintiff raises facial overbreadth challenge on behalf of non-parties, the "crucial issue[]" is whether plaintiff has established his own injury-in-fact first).

[7] Moreover, under the law of this circuit, as an alien residing in Yemen, Nasser al-Aulaqi would not have a liberty interest under the Constitution that could support the third party standing argument he seeks to pursue. *See, e.g., 32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *see also Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). In any event, the D.C. Circuit has clearly held that "a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority and independent." *Butera v. District of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001) ("[W]e hold that a parent-child relationship between two independent adults does not invoke constitutional 'companionship' interests[.]"); *see also McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003) (same); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986) (same). In so concluding, the D.C. Circuit has stated that childhood and adulthood are markedly distinct, thus requiring "sharply different constitutional treatment." *Franz v. United States*, 712 F.2d 1428, 1432 (D.C. Cir. 1983). Plaintiff ignores this distinction in citing various cases where courts found injury arising from the deprivation of or interference with a relationship between a parent and a *minor* child. *See Jones v. Prince George's County*, 348 F.3d 1014 (D.C. Cir. 2003) (infant daughter); *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53 (D.D.C. 2006) (six-year-old son); *Yaman v. U.S. Dep't of State*, 709 F. Supp. 2d 85 (D.D.C. 2010) (Bates, J.) (six and eight-year-old daughters). Plaintiff's son is a 39-year-old adult. Nasser al-Aulaqi Decl. ¶ 4. By plaintiff's own account, Anwar al-Aulaqi has lived independently from his parents for at least the last 19 years, is married, and has three children of his own. *Id.* Accordingly, Nasser al-Aulaqi cannot establish any Article III injury based on a liberty interest in the companionship of his adult child.

[8] As the D.C. Circuit noted in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 810 (D.C. Cir. 1987), in *Singleton* "[t]he decisive vote was cast by Justice Stevens, who found third party standing only because the physicians had first party standing."

relationship between the litigant and the third party. *See Haitian Refugee Ctr.*, 809 F.2d at 810 (explaining that the doctors in *Singleton* had standing to challenge a law that prohibited Medicaid payments for abortions that were not "medically indicated" because the statute was "specifically intended to burden the third-party patients' relationship with their physicians"). In contrast, third party standing is not appropriate where a challenged governmental action is not specifically intended to interfere with the relationship between a third party and a litigant who is attempting to assert the third party's rights, and impeding contact between the two parties is but "an unintended side effect of a program with other purposes." *See id.* (rejecting third party standing because impeding contact between Haitians and the litigants who were trying to help them was only an indirect effect of the Government's interdiction program). Here, no statutory provision or governmental action is alleged to be at issue that is specifically intended to interfere with a third party relationship. Notably, the D.C. Circuit has held that "a litigant may not be given third party standing to assert constitutional rights of third parties that do not protect a relationship, such as procedural due process rights. A litigant therefore could never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court." *Id.* at 809.[9]

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[9] Plaintiff cites *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279 (D.C. Cir. 2007), for the proposition that the threat of "death, physical injuries, and property damage" could constitute an injury in fact where an increased "risk of harm" results from the Government's failure to act. However, *Public Citizen* was not a third party standing case, but an organizational standing case. "An organization has standing to sue on behalf of its members when, among other things, its members would otherwise have standing to sue in their own right. Accordingly, an organization must show . . . that at least one member has suffered injury in fact." *Id.* at 1289 (citations and quotations omitted). In other words, a concrete, particularized threat of injury to a member of an organization necessarily constitutes a concrete, particularized threat of injury to the organization itself. This authority is obviously inapposite here.

Because plaintiff has not demonstrated his own redressable injury-in-fact, he fails to establish the constitutional prerequisite to third party standing. Assuming the Court considers the remaining prudential elements for such standing, and even assuming that plaintiff has a close relation with his son, plaintiff fails to demonstrate that his son is unable "to advance his own rights," *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989), because of a "genuine obstacle" that rises to the level of a hindrance, *Singleton*, 428 U.S. at 116. As set forth above, the notion that "some hindrance" exists to Anwar al-Aulaqi's ability to protect his own rights should be rejected because Anwar al-Aulaqi may choose to come forward peacefully and access the judicial process. Plaintiff should not be permitted to evade the requirements of next friend standing—which he cannot meet—through the backdoor of third party standing.

C. Plaintiff Otherwise Lacks Article III Standing.

Even if plaintiff could assert next friend or third party standing, he would still lack Article III standing for another reason: plaintiff's claim of injury rests on conjecture as to the nature of the alleged practices challenged. *See* Defs. Mem. at 16. Plaintiff's attempt to rehabilitate his allegation of injury is meritless—indeed, it confirms this standing problem.

Plaintiff first attempts to retreat from the injury alleged in the Complaint, stating in his opposition brief that "[h]e asserts an injury—his son's death" that would allegedly be caused by the Government's conduct, "specifically, its decision to authorize the use of lethal force." *See* Opp. at 3; *see also id*. at 15 ("Plaintiff seeks to prevent the government from killing his son."). But the Complaint does *not* seek to prohibit the United States from using any and all lethal force against Anwar al-Aulaqi (or any other U.S. citizen). Rather, plaintiff alleges that his son is being targeted "without regard to whether, at the time lethal force will be used, he presents a concrete,

specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." Compl. ¶¶ 23, 27-29 & Prayer for Relief. It is only the alleged failure of the Government to act in accord with these standards that establishes plaintiff's theory of the injury at issue in this case. But plaintiff's contention that the Government would not follow the criteria he seeks to impose is sheer speculation.

Article III standing requirements do not permit a plaintiff to seek equitable relief based on conjecture that the Government might act in a certain manner alleged to be unlawful, *see* Defs. Mem. at 16-17 (*citing City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983)), while the plaintiff offers nothing to establish that the allegation is more than conjecture. Plaintiff argues that he should be permitted to "assume" the Government will, absent an injunction, apply a standard different from the one that plaintiff believes should apply. *See* Opp. at 16. This plea just highlights that plaintiff is speculating that the Government is not acting (or would not act) in compliance with the standard plaintiff argues should be applied here. *See, e.g., Haitian Refugee Ctr.*, 809 F.2d at 799 n.2 ("It is well established that a bare assertion that the government is engaging in illegal or unconstitutional activity does not allege injury sufficient to confer standing."). Indeed, plaintiff confirms he is speculating as to whether the Government adheres to the criteria he claims must apply to the alleged use of lethal force. He argues that the Government's references to the law of war confirm the "possibility" of non-adherence to those criteria, Opp. at 5, and then demands that the Court order disclosure of any criteria the Government allegedly utilizes, so that he can determine "*[i]f* the government's standards are the same as those plaintiff contends should apply," and, if not, his "targeted killing claims can be dismissed." *Id.* at 6 n.4 (emphasis added). Such conjecture about what the Government might be

doing is inadequate to establish any legally cognizable injury "that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[10]

Plaintiff's reliance on anonymous sources in media reports likewise does not establish his standing. Based on such reports, plaintiff alleges that the Government maintains "lists" of individuals being targeted, that individuals remain on the "lists" for months at a time, that placement on the "lists" creates a standing authorization for use of lethal force, and that Anwar al-Aulaqi has been added to the "lists." *See* Opp. at 4. This information, plaintiff argues, "show[s] not only a realistic danger that the government will kill Plaintiff's son, but a realistic danger that the government will kill him without compliance with constitutional and human rights standards." *Id*. at 4-5 (*citing Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). But even taking these allegations at face value, they do not support a reasonable inference that Government officials have authorized the use of such force without compliance with the standards plaintiff contends are necessary for the alleged use of force to be lawful. *See* Defs. Mem. at 16. Moreover, the Government does not contend here that the alleged injury must be demonstrated "with certainty," as plaintiff asserts (*see* Opp. at 4)—only that the alleged harm cannot be based on conjecture, which it surely is in this instance.[11]

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[10] The Supreme Court has recently made clear that allegations must set forth "more than a sheer possibility" of alleged misconduct. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949-50 (2009) (*citing Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (*quoting Twombly*, 550 U.S. at 557).

[11] *Babbitt* does not support plaintiff's theory of standing. That case concerned pre-enforcement standing to bring a facial challenge to a statute based on "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." 442 U.S. at 298.

II. PLAINTIFF'S REQUESTS FOR RELIEF ARE NOT JUSTICIABLE.

Plaintiff's contention that his requests for relief are justiciable misrepresents the defendants' position. Defendants do not "argue broadly that the judiciary cannot interfere in decision-making in the areas of foreign policy and national security." Opp. at 24. Rather, defendants have focused on the specific claims and requests for relief in this case and argued that courts cannot (i) issue *ex ante* injunctions against the President or his senior military and intelligence officers with respect to (ii) the alleged use of lethal force (iii) purportedly to be undertaken abroad (iv) against an operational leader of (v) an organization with respect to which the political branches have authorized the use of necessary and appropriate force, and (vi) where granting and enforcing the specific relief sought would necessarily involve complex judgments reserved to the Executive, dependent on intelligence assessments, as to whether an alleged target poses a "concrete," "specific," or "imminent" threat, and whether means other than lethal force could be "reasonably" employed. *See* Defs. Mem. at 3-5; 19-27.

The political question doctrine requires the Court to conduct "a discriminating analysis of the particular question posed" in the "specific case," *Baker v. Carr*, 369 U.S. 186, 211 (1962), and the particular claim in *this* lawsuit is for *ex ante* declaratory and injunctive relief—not damages or some other after-the-fact remedy. Plaintiff challenges the authority of the President, *see* Compl. ¶ 10, and seeks review of the alleged future use of force overseas against an

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Such standing applies only where there is a threat of enforcement of a specific proscription that demonstrably applies to a plaintiff's actions. Notably, in *Babbitt* the Court rejected standing to challenge statutory provisions that did not impose certain requirements on employers (to grant access to facilities for communicating with employees) on the ground that the Court could "only hypothesize" that an injury would occur absent a "palpable basis for believing that access will be refused." *See id*. at 304. *Babbitt* thus shows that standing will not be found based on conjecture as to an alleged harm.

operational leader of a foreign terrorist organization that has planned attacks against the United States and with respect to which the political branches have authorized the use of necessary and appropriate force. *See* Defs. Mem. at 23-25. It is not the Government's contention here that any matter touching on foreign policy, national security, military, or intelligence affairs is non-justiciable, or that any overseas action—including the use of force—would be exempt from judicial review. Rather, it is the requests for declaratory and injunctive relief in this case that defendants contend are non-justiciable. The Court need not decide the issue for any other setting.

Plaintiff's primary argument in response—that courts have reviewed constitutional claims in the context of habeas detention proceedings and property disputes, *see* Opp. at 25-27, does not render this very different case justiciable, as defendants have previously explained. *See* Defs. Mem. at 30-31; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (distinguishing between process due a U.S. citizen "on the battlefield" for assessing the legality of their detention from process that is due "when the determination is made to *continue* to hold those who have been seized," which "meddles little, if at all, in the strategy or conduct of war").[12]

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[12] Plaintiff appears to argue that this Court should adjudicate whether the Authorization for the Use of Military Force (AUMF) authorizes the use of force against AQAP. *See* Opp. at 33. But the AUMF cases on which plaintiff relies concern a very different context: namely, a court's historical review of the facts in habeas proceedings that concern whether the continued detention of a particular individual is authorized. *See* Opp. at 33 (citing *Hamdi*, 542 U.S. 507; *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (Bates, J.)); *see also id*. at 18 (*citing Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008); *Khan v. Obama*, --- F. Supp. 2d ---, No. 08-CV-1101, 2010 WL 3833917, at *2-3 (D.D.C. Sept. 3, 2010) (Bates, J.)). Here, in contrast, plaintiff seeks judicial review of the Executive's judgment that force is authorized against a particular organization before the President may act to protect the nation against that organization. There is no precedent for the proposition that a federal court may determine before-the-fact whether the President has authority to target a particular enemy he has determined falls within the law. In addition, the Executive's judgment as to whether force is authorized against AQAP or any other organization is informed by changing circumstances and sensitive intelligence that cannot be disclosed in a case such as this. Indeed, any judicial

In addition, plaintiff now concedes that the Court cannot review *ex ante* "real-time" determinations by the President or his senior military and intelligence officers that lethal force may be required in response to an imminent threat. *See* Opp. at 30. But he nonetheless seeks declaratory and injunctive relief in order to set the stage for after-the-fact adjudication of precisely such questions. Rather than salvaging his argument that the relief sought is justiciable, this concession undercuts the basis for judicial action even further. Defendants are not aware of any historical precedent for the judiciary issuing directives to the Executive before the United States may take lethal action overseas and thereby threatening officials with the prospect of contempt sanctions if they are unable, after the fact, to persuade a court that their real-time assessments of imminence and necessity, based on complex military, intelligence, and foreign policy judgments, were reasonable. *See* Defs. Mem. at 26.

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direction based on current circumstances could quickly become obsolete when the Executive obtains new intelligence; thus, an injunction would necessarily impede the Executive's ongoing, real-time national security judgments. The Government has made limited public statements concerning the connection between AQAP and Al-Qaeda, *see* Exh. 3 (Dkt. 15-4), but, in the context of the relief sought in this case, the Government's state secrets privilege assertion necessarily encompasses additional intelligence information related to these organizations that would be necessary to adjudicate the issue as plaintiff requests. In any event, plaintiff ignores the critical distinction that the D.C. Circuit identified in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 848-49 (D.C. Cir. 2010) (*en banc*), that "the political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial role in this area." Likewise, plaintiff's attempt to distinguish *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973) and *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *see* Opp. at 36-37, is unpersuasive. Both decisions are broad rejections of the notion that courts may review the scope of a mutual decision by the political branches to authorize the use of force overseas and do not rest on the notion that only a "tactical" decision was non-justiciable. *See DeCosta*, 471 F.2d at1155; *Holtzman,* 484 F.2d at 1310. Similarly, the Second Circuit's decision in *Orlando v. Laird,* 443 F.2d 1039 (2d Cir. 1971), ultimately held that "'decisions regarding the form and substance of congressional enactments authorizing hostilities'" are political questions because they "are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry.'" *Id*. at 1043.

A. *Gilligan v. Morgan* Strongly Supports Non-Justiciability Here.

Plaintiff's effort to distinguish *Gilligan v. Morgan*, 413 U.S. 1 (1973), is unavailing. *Gilligan* presented remarkably similar issues and weighs heavily against finding the claims at issue here to be justiciable. Indeed, *Gilligan* arguably involved a lesser intrusion on the political branches—the regulation of future lethal force in domestic civil disorders by the National Guard—as opposed to an injunction on the President with respect to possible uses of force overseas against terrorist entities as to which the political branches have authorized such force.[13]

First, while it is true that *Gilligan* involved more than one jurisdictional concern, including mootness issues, *see* 413 U.S. at 5, the Supreme Court made clear that it was "not prepared to resolve the case on that basis and therefore turn[ed] to the important question [of] whether the claims alleged in the complaint, as narrowed by the Court of Appeals' remand, are justiciable." *Id.* The question remanded by the Court of Appeals, and which the Supreme Court considered to be non-justiciable, concerned whether there was any basis for believing that the future use of lethal force would violate relevant legal norms:

> Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?

Id. at 4. As to that question, the Supreme Court held that judicial evaluation of the training, weapons, and scope of orders to control the use of lethal force would plainly intrude on textually

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[13] *Gilligan*, which rejected a due process claim in part on justiciability grounds, also disposes of plaintiff's suggestion that any Fourth or Fifth Amendment claim is *per se* justiciable because the adjudication of these rights is "textually committed" to the judicial branch. *See* Opp. at 24; *see Gilligan*, 413 U.S. at 6.

committed authority of the President and Congress. *See id*. at 6-7.

Second, while *Gilligan* was not "an action seeking a restraining order against some specified and imminently threatened unlawful action," *see id*. at 5, the Supreme Court did not hold that such a claim would necessarily be justiciable (particularly in the circumstances presented here). And, in any event, the relief sought in this case does entail a "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of" the President, armed forces, and intelligence services, *id.*, precisely in order to support "continuing judicial surveillance . . . to assure compliance" with the law. *Id*. at 6. *See* Compl. at 11, Prayer for Relief (seeking declaratory and injunctive relief regarding the use of lethal force as to all U.S. citizens, including plaintiff); Opp. at 17 (seeking enforcement of requested relief through after-the-fact remedies). Plaintiff seeks the imposition of legal standards governing future conduct closely akin to the specific question at issue in *Gilligan*: whether the Government has a "pattern of . . . orders . . . which singly or together require or make inevitable the use of fatal force . . . when the total circumstances at the critical time are such that nonlethal force would suffice . . . and the use of lethal force is not reasonably necessary." 413 U.S. at 4. *Gilligan* thus firmly supports the conclusion that plaintiff's claims are non-justiciable.

B. Whether "Armed Conflict" Exists Against AQAP Is Non-Justiciable.

Finally, the Court should disregard plaintiff's extended argument that "armed conflict" does not exist in Yemen as a matter of international law. *See* Opp. at 32-35. Plaintiff—not the Government—injects this issue into the case, arguing that all of his claims depend upon the absence of such an armed conflict. But even assuming the "armed conflict" issue were relevant here, that issue would also be non-justiciable in the context of this case—where *ex ante*

declaratory and injunctive relief is sought to regulate the future use of force overseas by the President and his senior military and intelligence officers against an entity as to which the political branches have authorized the use of necessary and appropriate force.

Plaintiff's argument that any use of lethal force against Anwar al-Aulaqi in Yemen would not be as part of an ongoing armed conflict is based on assertions by plaintiff's declarants that AQAP is incapable of engaging in armed conflict because it is, *inter alia,* fragmented, small, lacks an organization chart, has an amateurish online operation, has dubious relationships with the Government of Yemen, and has engaged in only a small number of attacks that render it an "irritant." *See* Decl. of Bernard Haykel ¶¶ 7-13; *see also* Decl. of Prof. Mary Ellen O'Connell. With due respect, even assuming the standards plaintiff advances for determining whether AQAP could be a participant in an armed conflict were correct as a matter of international law, the Government is aware of no instance where a court has reviewed *ex ante*, based on opinion testimony, the Executive's determination that an organization is sufficiently organized as to be engaged in armed conflict. In these circumstances, the President's judgment, based largely on intelligence information addressing the manner in which AQAP is organized, the nature and scope of its activities, and its relationship to al-Qaeda, is not subject to review.[14]

III. THE COURT SHOULD EXERCISE ITS DISCRETION NOT TO ENTER THE REQUESTED EQUITABLE RELIEF.

Even if the Court were to conclude that plaintiff's claims here are justiciable, it should nonetheless exercise its equitable discretion to deny the declaratory and injunctive relief sought. *See* Defs. Mem at 35-39. The question under the equitable discretion doctrine is not only

[14] Plaintiff does not dispute that the United States is engaged in an armed conflict with al-Qaeda. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006).

whether the Court has "authority" to act, *see* Opp. at 15, but whether it *should* exercise any such authority to grant the relief sought. For all of the reasons previously set forth, the Court should decline to do so in this case. *See* Defs. Mem. at 35-39.

Plaintiff dismisses long-standing precedent that courts should not impose injunctive relief on the President, *see* Defs. Mem. at 37-38; Opp. at 20-21—an equitable principle that, in the unusual circumstances of this case, should also necessarily apply to the President's top military and intelligence officers who carry out the President's orders. *See* Defs. Mem. at 38 (*citing Mississippi v. Johnson*, 71 U.S. (4 Wall) 475, 499 (1866)). This case does not concern governmental actions unmoored from core presidential powers as to which lower level officials may be enjoined—such as the submission of reapportionment data by the Secretary of Commerce, or the termination of an employee of the National Credit Union Administration. *See* Opp. at 21 (*citing*, *inter alia*, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *Swan v. Clinton*, 100 F.3d 973, 979 (D.C. Cir. 1996)). The relief plaintiff seeks puts directly at issue the President's core constitutional and statutory authority to act overseas through his senior military and intelligence officers against a foreign terrorist organization.

Plaintiff further contends that the declaratory and injunctive relief at issue would not be any more "abstract" than the "command" issued by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment" considering the "totality" of the circumstances. *See* Opp. at 17. Leaving aside that these are inherently fact-specific judgments, the lawsuit in *Garner* adjudicated the legality of a particular use of force *after the fact*, and the notion that its "command" should be properly imposed *ex ante* on the President's authority to use

force overseas against a particular foreign terrorist organization is profoundly wrong. Even if the constitutional principles set forth in *Garner* were applicable in the alleged context, imposing them *ex ante* by declaratory or injunctive relief to the circumstances at issue here would necessarily interfere with the judgments of the President and senior defense and intelligence officials as they face changing, fact-intensive decisions concerning how to protect national security and, thus, could have unforeseen and potentially catastrophic consequences. These are precisely the kind of delicate national security and foreign policy matters in which courts should decline to intrude. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985).

IV. PLAINTIFF HAS NO CLAIM UNDER THE ALIEN TORT STATUTE.

In accordance with the Supreme Court's emphasis in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), that courts must engage in "vigilant doorkeeping" in recognizing a "narrow class" of actions under the ATS, 28 U.S.C. § 1350, this Court should not create the novel claim for relief under the ATS that plaintiff seeks in this case. Plaintiff is asserting a claim *in his own name* under the ATS, not as next friend to his son. Compl. ¶ 29.[15] It follows that his claim must be for an injury *to himself* and not for an injury to anyone else, including his son.[16] But there is

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[15] Plaintiff's son cannot bring an ATS action in his own name (he is a U.S. citizen, and the ATS applies only to a "civil action by an alien," 28 U.S.C. § 1350). Moreover, if Nasser al-Aulaqi brought an ATS damages action on behalf of his son's estate, the estate would likely share his son's U.S. nationality (and plaintiff has not shown otherwise), *cf.* 28 U.S.C. § 1332(c)(2) ("the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent"), and thus would be precluded from raising an ATS claim, which permits only a "civil action *by an alien*," 28 U.S.C. § 1350 (emphasis added).

[16] This is true under both federal law, *see Whitmore,* 495 U.S. at 155 ("complainant must allege an injury *to himself*") (emphasis added); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting the "general prohibition on a litigant's raising another person's legal rights"), as well as under international law, *see*, *e.g.*, U.S.-German Mixed Claims Commission, Opinion in the Lusitania Cases, Nov. 1, 1923, 7 U.N.R.I.A.A. 32, 35.

nothing in the Complaint to support an allegation that plaintiff would be subjected to an extrajudicial killing. Thus, whatever he may attempt to plead, the only kind of injury plaintiff can assert on his own behalf under the ATS claim is something akin to anticipated intentional infliction of emotional distress against a bystander. And for reasons the Government has already explained (Defs. Mem. at 41-42), plaintiff has not demonstrated that any such claim would be recognized even under domestic U.S. tort laws. Nor can he show—as required by *Sosa*, 542 U.S. at 732—that established international law protects bystanders from intentional infliction of emotional distress, let alone that such a norm has no "less definite content and acceptance among civilized nations than the historical paradigms familiar" when the ATS was enacted in 1789.

Plaintiff fails to grapple with who, exactly, is bringing the ATS claim (the father, not the son) and what alleged injury *that* plaintiff might suffer (emotional distress, not a killing). Plaintiff simply asserts, without support, that he may bring a claim *in his own name* to enjoin an alleged tort of extrajudicial killing that might, in the future, be inflicted *on someone else*. Opp. at 39-40. Plaintiff asserts that if his son were killed, he could bring an ATS action for damages. Opp. at 40 n.33. But he has made no showing that such a damages claim for an extrajudicial killing of his son would be anything more than a suit *in the son's name*, with the father acting only as legal representative of the deceased. *Cf.* Torture Victim Protection Act, 28 U.S.C. § 1350 note (an individual who subjects another individual to extrajudicial killing shall "be liable for damages to the individual's legal representative"). The assertion thus sheds no light on whether plaintiff can bring an ATS claim for injunctive relief *in his own name* for an extrajudicial killing that supposedly will be inflicted *on another person* in the future.

Moreover, plaintiff's claim (Opp. at 40) that "there is nothing new" about the injunctive

relief he seeks is incorrect. Plaintiff asks this court to use its restricted power to create federal common law to fashion an extraordinary cause of action under the ATS for injunctive and declaratory relief – at the behest of an alien outside the United States – against the President, the Secretary of Defense, and the CIA Director with respect to alleged military and intelligence operations abroad. And he seeks such a claim based on speculation about an injury that has not yet occurred and that, if it did occur, would be inflicted not on himself but on his son, who is not entitled to bring an ATS action. Plaintiff cannot point to a single ATS case recognizing a claim remotely similar to the one he seeks

Relatedly, the D.C. Circuit has held that courts should not fashion a cause of action for damages under *Bivens* against U.S. officials based on alleged constitutional violations arising out of military operations abroad. *Rasul v. Meyers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009). *A fortiori* a court should not fashion a federal common law cause of action for injunctive and declaratory relief under the ATS that would restrain the President and his top military and intelligence officers in the conduct of such foreign operations. Indeed, plaintiff cites only two ATS cases recognizing *any kind* of injunctive relief. *See* Opp. at 40-41. But both cases pre-date the Court's warning in *Sosa*, 542 U.S. at 728, to use "great caution" in exercising common-law authority under the ATS. And neither case is remotely comparable to the novel and extraordinary relief sought here against the President and his highest advisors and officers.[17]

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[17] One case involved injunctive relief against a fugitive indicted foreign war criminal. *See Kadic v. Karadzic*, Opp. at 41 n.36. The other case, *Von Dardel v. USSR*, 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990), is a *vacated* district court decision based on a *default* judgment in which the defendant did not respond or present any kind of argument to the court on the ATS, and involved injunctive relief against the Soviet Union that simply required it (in plaintiff's words) to "account for" a person's "whereabouts," Opp. at 41.

Furthermore, as explained in the United States' opening brief (Defs. Mem. at 40-41), the Government has not waived its sovereign immunity for plaintiff's claim under the ATS. Plaintiff cannot dispute that "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity," *Sanchez-Espinoza*, 770 F.2d at 207 (Scalia, J.), and concedes that the APA does not permit a suit for injunctive relief *against the President*. Opp. at 43. Even if the APA waives sovereign immunity for injunctive relief against subordinate federal officers, Opp. at 43, the APA does not displace a court's authority and responsibility to "deny relief on . . . any other appropriate legal or equitable ground." 5 U.S.C. § 702. And as defendants previously explained (Defs. Mem. at 41), courts have held that "it would be an abuse of [] discretion to provide discretionary relief" under the APA where a case involves "military operations that [the court is] asked to terminate," and where "the allegations in the complaint" are that those military operations "received the attention and approval of the President . . . the Secretary of Defense, and the Director of the CIA, and involve[] the conduct of our diplomatic relations with [a] foreign state[]." *Sanchez-Espinoza*, 770 F.2d at 208. That is exactly the case alleged by plaintiff's complaint.

Contrary to plaintiff's suggestion, Opp. at 44 n.38, the discretionary relief sought under the APA in *Sanchez-Espinoza* was not meaningfully different from the discretionary APA relief sought here. To be sure, some plaintiffs in *Sanchez-Espinoza* did seek different relief, *see* 770 F.2d at 205, not under the APA but under different federal and state law, *see id.* at 210. But as to the relief sought *under the APA*, the D.C. Circuit was clear about the nature of the requested relief – namely, that the court was "asked to terminate" certain alleged "military operations" approved by the President and senior officials, involving "the conduct of our diplomatic relations with [a] foreign state[]," *see id.* at 208. The court was equally clear that "it would be an abuse of

our discretion to provide discretionary relief" in such a case, *ibid.* Neither the relief requested here nor the result under the APA differs from that in *Sanchez-Espinoza.*

Finally, plaintiff argues (Opp. at 41-43) that immunity is waived under the so-called *Larson-Dugan* exception to sovereign immunity, which "holds that sovereign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority, on the ground that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign acts.'" *Swan*, 100 F.3d at 981. But in *Sanchez-Espinoza*, the D.C. Circuit, after citing *Larson* and noting that injunctive relief might be available against federal officers "when the officer's action is unauthorized because contrary to statutory or constitutional prescription," nonetheless held that the exception "can have no application" to an ATS claim brought against federal officers. 770 F.2d at 207.

V. THE STATE SECRETS PRIVILEGE NEED NOT BE REACHED, BUT WOULD PROPERLY FORECLOSE LITIGATION OF THIS CASE.

The Government has made clear that its final ground for dismissal—the state secrets privilege—need not be reached because the foregoing grounds for dismissal are more than sufficient. *See* Defs. Mem. at 43-44. But it is also evident that this lawsuit seeks to probe into alleged military and intelligence activities, and that specific categories of national security information properly protected by the privilege assertion would be necessary to litigate the case.

Plaintiff first appears to contend that the privilege assertion should not be upheld because of the nature of his claims involving alleged lethal force against a U.S. citizen (*see* Opp. at 46-47)—without regard to whether litigation would necessarily risk or require disclosure of information that would harm national security. But it is not the nature of the claim, standing

alone, that determines the applicability of the privilege or whether further proceedings in a case reasonably could be expected to harm the national security of the United States. The state secrets doctrine clearly applies to the allegations in this case.

Plaintiff further contends that media speculation and some public disclosures concerning Anwar al-Aulaqi warrant rejection of the privilege assertion. *See* Opp. at 45-47. The Government addressed plaintiff's concern at length in its prior submissions to the Court, *see* Defs. Mem. at 56-59, and has set forth for the Court's *ex parte, in camera* review specific privileged information implicated by the allegations in this case and why its disclosure reasonably could be expected to harm national security. In unclassified terms, this includes information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat posed by al-Qaeda, AQAP, or Anwar al-Aulaqi, and other matters that plaintiff has put at issue, including any criteria governing the use of lethal force. *See id*. at 48-49.[18] The Secretary of Defense, the CIA Director, and Director of National Intelligence have demonstrated that the unauthorized disclosure of certain information needed to litigate the case reasonably could be expected to cause significant harm to national security. *See id*. at 49-50.

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[18] The Government has not asserted the state secrets privilege over the information contained in the Department of Defense (DoD) slides released to plaintiff's counsel through a Freedom of Information Act request. *See* Jonathan Manes Decl. (Dkt. 24-3), Exh. A thereto. Those slides concern DoD military targeting and force actions in general and do not concern or reveal anything as to alleged military operations in Yemen, including those alleged to be at issue in this case. *See, e.g.*, Slide 8 (Dkt. 24-3 at ECF page 11 of 52) (any application of targeting process involves applicable commander's objectives and guidance). The disclosure of certain DoD information implicated by the allegations in this case is precluded by the military and state secrets privilege. *See* Public Sec'y Gates Decl. (Dkt. 15-5). Far from undercutting defendants' position, the release of these slides underscores the Government's effort to publicly release information consistent with its obligation to protect national security.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss.

Date: October 18, 2010 Respectfully Submitted,

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Exhibit 1

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Photos from the Operations of Abyan

Special: Samir Khan: I am proud to be a traitor to America | **Exclusive:** The New Mardin Declaration by al-Awlaki

The New Mardin Declaration:
An Attempt at Justifying the New World Order

Shaykh Anwar al-Awlaki

It is important that we[1] encourage Muslims to respect their scholars. It is to no one's benefit to put down the men of knowledge who represent the religion of Allah. But when some of our scholars - no matter how knowledgeable they are - divert from the straight path, we the Muslims, need to advise them. Everyone beyond the Messenger of Allah ﷺ stands corrected. Umar (may Allah be pleased with him) asked from the pulpit: "If I divert away from the straight path what would you do?" One of the companions replied: "We will put you straight with our swords." There is another incident were an old woman corrected Umar when he was speaking. Umar said: "Umar was wrong and the woman was right." That is a healthy spirit that Muslims need to develop today. We respect our scholars, but ours is a principle centered religion; it is not centered on men.

In April 2010, in the city of Mardin, a group of scholars gathered[2] in order to re-interpret the *fatwa* of Ibn Taymiyyah which was in response to a question sent to him pertaining to the situation of the city of Mardin, where Muslims and non-Muslims lived and, at the time, it was being ruled by non-Muslims.

The scholars meeting in Mardin issued what they dubbed as *"The New Mardin Declaration"* in which they declared the *fatwa* of Ibn Taymiyyah unsuitable for our times and should not be used by "extremists to justify violence".

Following are excerpts from the declaration along with my comments:

> It is such a changed context that Ibn Taymiyya took into consideration when passing his fatwa, and that now makes it imperative that contemporary jurists review the classical classification, because of the changed contemporary situation: Muslims are now bound by international treaties through which security and peace have been achieved for the entire humanity, and in which they enjoy safety and security, with respect to their property, integrity and homelands.

Has peace really been achieved for the entire humanity? Are Muslims enjoying security and peace? Or they don't really matter as long as Western societies are the ones enjoying it? Are these scholars following the news?

If they think that they are enjoying peace and security, the majority of the *ummah* think otherwise.

I read the above mentioned statement and it made me ill at ease. I read it and reread it and just couldn't come into terms with it. Coming from a Western politician such a statement might be expected, but from a group of "eminent" Muslim scholars? I must say that with all the respect I try to have towards our learned ones, the above statement is an ignominy that would be bad enough if it was blurted out in an impromptu speech let alone a well deliberated and thought-out, written declaration. It is an insolent statement that shows no respect to the sufferings of our *ummah*. It is a slap on the face of the Palestinian widow and the Afghan orphan. It is disrespectful towards the millions of Muslims around the globe who are suffering because of the international community which these scholars are crediting for bringing so much "security and peace".

By such a statement they are not representing the *ummah* nor are they reflecting its sentiments. They are speaking for none other than themselves.

Secondly, they claim that Muslims are "bound by international treaties."

Why are the Muslims bound to them? Who bound them?

The international community they respect so much was born at the funeral of the last Islamic *Khilāfah*. The Western powers came into

1 This article was written as a refutation of the new Mardin declaration by Shaykh Anwar al-Awlaki and completed in April. However due to technical difficulties its publication was delayed.

2 This gathering included the scholars Hamza Yusuf from the U.S., Abdullah bin Bayyah from Mauritania, Abdul Wahhab at-Tariri from Riyadh, Habib Ali al-Jifri from Yemen and many others.

domination after they exterminated the Ottoman *Khilāfah* and divided it amongst themselves into zones of influence. They destroyed the *Khilāfah*, established control over the international community and then came up with these treaties; and we were not there at the table, we had no representation whatsoever, we were completely and utterly ignored in the decision making process on the world stage. We were not even present at the signing ceremonies. So why are we bound to those treaties? What kind of *fiqh* or logic would make such treaties binding on us? We had no part and no say in any of these treaties. We only have a presence in the crammed hall of the general assembly of the United Nations, but not at the Security Council which is still off limits to the 50 plus Muslim states.[3]

Probably they should read up a bit and refresh their memories with, not wars of the past centuries, but the wars fought recently by these particular democratic nations they are trying to protect.

They should remember WWII, the most devastating war man has ever fought; the war in which the greatest number of soldiers and civilians ever died. It was also the first war in modern history were the number of civilians killed was greater than the number of soldiers. About 30 million soldiers and about 50 million civilians lost their lives in this brutal war. Then came Korea, Vietnam, and now Iraq and Afghanistan. For the last fifty years the Palestinian dilemma has been a shameful chapter in the book of humanity. Have we already forgotten the war of the Balkans where Europe watched in silence the genocide of European Muslims?

3 It needs to be noted that I am only describing the current state of affairs. By no means should it be understood to be an approval of Muslims states being part of the United Nations.

So what exactly do they mean by "security and peace have been achieved for the entire humanity?"

Following are the conclusions the scholars have reached:

> Ibn Taymiyya's fatwa concerning Mardin can under no circumstances be appropriated and used as evidence for leveling the charge of kufr (unbelief) against fellow Muslims, rebelling against rulers, deeming game their lives and property, terrorizing those who enjoy safety and security, acting treacherously towards those who live (in harmony) with fellow Muslims or with whom fellow Muslims live (in harmony) via the bond of citizenship and peace. On the contrary, the fatwa deems all of that unlawful, not withstanding its original purpose of supporting a Muslim state against a non-Muslim state. Ibn Taymiyya agrees with all of this, and follows the precedent of previous Muslim scholars in this regard, and does not deviate from their position. Anyone who seeks support from this fatwa for killing Muslims or non-Muslims has erred in his interpretation and has misapplied the revealed texts.

Overall the language used in this declaration is not that of Islamic jurisprudence but is more a language of a combination of lawyers and peace activists. One may understand that out of their desire of brevity they did not include the textual evidence for their sweeping blanket statements and conclusions but that wouldn't be much of a problem if these conclusions were in line with Islamic law, but they are not.

The statement declares that we cannot level the charge of *kufr* against fellow Muslims, we are not allowed to rebel against rulers, and we are not allowed to terrorize those who enjoy safety and security.

We are not allowed to level the charge of *kufr* against fellow Muslims, which is true. But when a Muslim does commit *kufr bawaĥ* (open unbelief), the charge of *kufr* does need to be leveled against him. Muslims should level the charge of *kufr* against those whom Allah and His Messenger ﷺ considered as disbelievers, not more, not less.

Concerning the rulers: if they are Muslim, but oppressive, *ahl as-Sunnah* have two opinions: the first is they are allowed to rebel against them and this was what happened during the early generations: The revolt of al-Hussain against Yazid, Abdullah bin al-Zubair against Marwan, Abdul Rahman bin al-Ash'ath against Abdul Malik, Muhammad al-Nafs al-Zakiyyah and Zaid bin Ali against the Abbasids.

The second opinion: We are not allowed to rebel against the Muslim ruler even if he is oppressive and this is the majority view. Our classical scholars reached this conclusion after studying our early history. Their view is that the rebellions against the oppressive rulers brought more evil than the oppression of the rulers.

However, and this is the crux of the matter: If a ruler has committed disbelief then it is obligatory to revolt against him. This is a matter of consensus among the classical scholars of *ahl as-Sunnah*.

The declaration goes on to claim that we may not terrorize those who enjoy safety and security. To throw out such a blanket statement that we are not allowed to terrorize those who enjoy safety and security in light of the present state of the world is another reckless statement. According to these scholars, we the Muslims are not allowed to terrorize the Israelis, or the Americans, or the British who are living in safety and security while millions of Muslims are being terrorized by them. We are told to never mind the insecurity of the Palestinian or the Chechen or the Kashmiri. Never mind them. We are simply not allowed to terrorize,

period.

No. We do not agree with that. We do not agree with that because Allah ﷻ says: {**And prepare for them what you can of strength and steeds of war that you may terrorize with it the enemy of Allah and your enemy**} [*al-Anfāl*: 60]

We say that whoever terrorizes us, we will terrorize them and we will do what we can to strip them of their safety and security as long as they do us the same. They continue:

> The classification of abodes in Islamic jurisprudence was a classification based on ijtihād (juristic reasoning) that was necessitated by the circumstances of the Muslim world then and the nature of the international relations prevalent at that time. However, circumstances have changed now: The existence of recognized international treaties, which consider as crimes wars that do not involve repelling aggression or resisting occupation; the emergence of civil states which guarantee, on the whole, religious, ethnic and national rights, have necessitated declaring, instead, the entire world as a place of tolerance and peaceful co-existence between all religions, groups and factions in the context of establishing common good and justice amongst people, and wherein they enjoy safety and security with respect to their wealth, habitations and integrity. This is what the Shari'ah has been affirming and acknowledging, and to which it has been inviting humanity, ever since the Prophet (peace and blessings be upon him) migrated to Madina and concluded the first treaty/peace agreement that guaranteed mutual and harmonious co-existence between the factions and various ethnic/race groups in a framework of justice and common/shared interest. Shortcomings and breaches perpetrated by certain states that happen to scar and mar this process cannot and should not be used as a means for denying its validity and creating conflict between it and the Islamic Shari'ah.

The classification of abodes in Islamic jurisprudence is exactly that: a classification. It is not some sort of innovative new law. It is simply a classification based on the many textual references on the subject. When Ibn Taymiyyah introduced his modified classification, that was based on the new situation of Muslims living under non-Islamic rule; it was based on this new circumstance but there was no changing of the rulings and it was in line with Islamic teachings. It was simply, a change in the classification. What we are presented with here in this declaration is not merely a reclassification of abodes, but a thorough revision of *usūl* (Islamic principle tenets or foundations) based on a new world order agenda.

"The existence of recognized international treaties…" They are recognized by the ones who set them and not by us.

"…which consider as crimes wars that do not involve repelling aggression or resisting occupation." Not at all. The international community does not consider the U.S. invasion of Iraq and Afghanistan to be a crime. It does not consider the Israeli occupation of the land of pre-1967 to be a crime. Nor does it consider China, India, or Russia as criminals in their respective occupation of Muslim lands. It does not consider Spain to be criminal in its occupation of Ceuta and Melilla (let alone considering it to be criminal for occupying the entire Iberian Peninsula from the Muslims).

So what do they exactly mean by these international treaties?

This declaration is out of touch with the realities on the ground.

When they say: "…the emergence of civil states which guarantee, on the whole, religious, ethnic and national rights," The civil states referred to here have banned the niqab and fiercely defended the right to defame Muhammad ﷺ. They allow a very restricted form of personal worship that does not truly accommodate for the comprehensiveness of Islamic practice. The civil state has more authority over the wife and children than the Muslim head of the household. The law of Allah is not recognized by this civil state and the Muslim is forced to accept rulings of courts of law that are contrary to the law of Allah. So, on the whole, the modern civil state of the West does not guarantee Islamic rights.

Also, when they say: "…necessitated declaring, instead, the entire world as a place of tolerance and peaceful co-existence between all religions," Islam can never recognize and live in peaceful co-existence with worshiping a cow or an idol. Islam does not recognize *shirk*. Allah has honored us with guidance. With this honor comes the added

responsibility of sharing the light of Allah with the world.

I challenge these scholars to point out to me one - just one - Prophet of Allah who lived in peaceful coexistence with the disbelievers?

From Adam (peace be upon him) all the way to Muhammad ﷺ, not one of them, not a single one, lived with the disbelievers without challenging them, opposing them and exposing their falsehood and resisting their ways. Not one of them lived without a conflict with the disbelievers that ended up with a total and final separation between the two camps: a camp of belief and a camp of *kufr*. The disbelievers were then destroyed either through a calamity or by the hands of the believers.

This is what the Qur'an teaches us about the Prophets. A cursory study of the Qur'an would solve such confusion over what our relationship with the *kuffār* should be like.

> Amongst the priorities of Muslim scholars and Islamic academic institutions, there should be the analysis and assessment of ideas that breed extremism, takfīr (labeling fellow Muslims as unbelievers) and violence in the name of Islam. Security measures, no matter how fair and just they may happen to be, cannot take the place of an eloquent (scholarly) elucidation supported by proof and evidence. Therefore, it is the responsibility of the ummah's religious scholars to condemn all forms of violent attempts-to-change or violent protest, within, or outside, Muslim societies. Such condemnation must be clear, explicit, and be a true manifestation of real courage-in-speaking-the-truth, so as to eliminate any confusion or ambiguity.

The Messenger of Allah ﷺ warned against the *khawārij* who represented a manifestation of extremist belief and actions. There are two traits of the *khawārij* that stand out: Firstly, they use to accuse Muslims of *kufr* based on acts that are considered to be major sins and not acts of disbelief. They considered the one who commits such sins to be destined to an eternal punishment in Hellfire. So adultery, fornication, drinking alcohol, and theft are all sins that commit a person to eternal punishment. They have also accused the companions of the Messenger of Allah ﷺ such as Ali and Mu'awiyah of being disbelievers.

The second trait: They kill Muslims and spare the lives of disbelievers. The *khawārij* have caused so much civil strife during the reign of the Umayyads and the Abbasids and yet, they had no record of jihad against the disbelievers. Therefore, the *khawārij* are a phenomenon that manifests itself during Islamic rule and fades away, although not completely, during times like ours. Yes, there still remains strains of *takfīr* today that are similar to those of the *khawārij* of yesterday but the problem of extremism is a problem that is most pronounced during times of the strength of the *ummah* rather than moments of weakness. In times like ours, it is the problem of the other extreme, *irja`*, that we need to actively tackle. The *Murji`ah* went to the other extreme end of the scale and considered that no act that a Muslim might commit would take him out of the folds of Islam. For example, according to the *Murji`ah*, if a Muslim legislates laws and implements them in place of the laws of Allah, he is still a Muslim.

What we need is the middle path; the path of the Messenger of Allah ﷺ and his companions; the path that follows the Qur'an and Sunnah. That is the straight path that we invoke Allah in every *raka`āh* of *Şalah* to grant us.

But sadly this is not what this declaration is about. This declaration does not represent the middle path. It represents a benign version of Islam that is friendly towards the power holders of the day and stands against the changing of the status quo. The declaration calls for a blanket condemnation of "all forms of violent attempts-to-change or violent protest, within, or outside, Muslim societies."

This might be the way of Gandhi or Martin Luther King, but it is not the way of Muhammad ﷺ who said: *"I was sent with the sword before the Day of Judgment."*

Islam does recognize changing through force and that is what fighting *fī sabīlillāh* is. Today we cannot expect Palestine, Iraq or Afghanistan to be freed again except by force. Israeli and American aggression cannot be met with pigeons and olive branches but must be met with bullets and bombs. It is through the heroic acts of the Palestinian martyrs that Israel had forsaken its dream of a greater Israel and retracted upon itself behind walls and barriers. It is because of these operations that Ariel Sharon unilaterally pulled out all Jewish settlements in Gaza. The strategy of the Palestinian resistance succeeded in exhausting the enemy and forcing it into giving concessions. It was not until internal differences within the Palestinian rank that the tide turned again in favor of the Israelis.

The rule of "what is taken by force cannot be returned except through force" is not only valid from a historical point of view but it is also the statement of Qur'an: {**So fight, [O Muhammad], in the cause of Allah; you are not held responsible except for yourself. And encourage the believers [to join you] that perhaps Allah will restrain the [military] might of those who disbelieve. And Allah is greater in might and stronger in [exemplary] punishment**} [*an-Nisā'*: 84]

What we see from the disbelievers today is not overtures of peace but demonstrations of might. The *āyah* makes it clear that through fighting and inciting the believers to fight – and not through concessions, appeasement, turning the other cheek or even *da`wah* – is the might of the disbelievers restrained.

At a time when American expenditure on its army is anything but decreasing, these scholars are asking us to give up any form of resistance and live as law – Western law that is – abiding citizens. They are asking us to live as sheep, as pleasantly as a flock of tame, peaceful, and obedient sheep. One billion and a quarter Muslims with no say on the world stage, stripped from their right to live as Muslims under the law of Islam, directly and indirectly occupied by the West, are asked to live as sheep. Is that the role of scholars?

America is increasing its military budget not to fight Martians but to fight Muslims. On the other hand, Iran is building the most powerful military in the region. The foundations of the empire of the Shi'a are being laid in front of our own eyes. With some foresight, one can see where this is heading. The area termed the 'Middle East' is edging towards a war on a colossal scale. The *ahl as-Sunnah* up until this moment are the weakest of the three conflicting parties. The Gulf monarchs and the military juntas have completely sold us out. Our heads of state have betrayed us at a critical moment in our history. The last thing we need is for our scholars to follow suit. The *ahl as-Sunnah* do not need more demoralization. They do not need scholars to tell them to pull the shades over their eyes and live in peace in a "civilized" world under the protection of "international treaties" when we, who are living in the Muslim world, foresee that we are standing on the very battlegrounds of the coming world war.

Dear respected scholars: please spare us your letting down. The Messenger of Allah ﷺ said: *"Whoever believes in Allah and the Last Day should either say good or remain silent."*

In trialing times like these, we need to remind ourselves with this advice.

The declaration goes on to state: "Such condemnation must be clear, explicit, and be a true manifestation of real courage-in-speaking-the-truth." Courage? Absolutely not. There is no courage in condemning Jihad. There is nothing in it but cowardice.

> Muslim scholars, throughout the ages, have always stressed and emphasized that the jihad that is considered the pinnacle of the religion of Islam, is not of one type, but of many, and actually fighting in the Path of God is only one type. The validation, authorization, and execution of this particular type of jihad is granted by the Shari'ah to only those who lead the community (actual heads of states). This is because such a decision of war is a political decision with major repercussion and consequences. Hence, it is not for a Muslim individual or Muslim group to announce and declare war, or engage in combative jihad, whimsically and on their own. This restriction is vital for preventing much evil from occurring, and for truly upholding Islamic religious texts relevant to this matter.

> The validation, authorization, and execution of this particular type of jihad is granted by the Shari'ah to only those who lead the community (actual heads of states).

This statement needs elaboration. There is no explicit evidence that the permission of the Imam is needed for jihad. But the scholars deducted such a requirement from other evidence and because jihad is an act of worship with critical and encompassing consequences. However, the scholars also mentioned a few exceptions to this rule. The one exception relevant to our discussion here is in the situation where there is no Imam or in the case where it is known that the Imam does not promote jihad. In such a case, the scholars stated that both the offensive and defensive forms of jihad should not be stopped but should be carried out by the *ummah*. Ibn Qudamah stated that in the absence of the Imam, jihad should not be stopped and the spoils of war should be divided among the fighters according to the rules of shari'ah. Ibn Rushd states that: "obeying the Imam is mandatory unless the Imam orders the Muslims to commit a sin, then he should not be obeyed, and preventing Muslims from fighting obligatory jihad is a sin."

> The basis of the legitimacy of jihad is that it is either to repel/resist aggression ("Fight in the cause of Allah those who fight you, but do not transgress limits; for Allah loveth not transgressors" — Şūrah al-Baqarah, 190), or to aid those who are weak and oppressed ("And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?" — Surah al-Nisā', 75), or in defense of the freedom of worshiping ("To those against whom war is made, permission is given (to fight), because they are wronged; — and verily, Allah is most powerful for their aid" — Surah al-Ĥajj, 39). It is not legitimate to declare war because of differences in religion, or in search of spoils of war.

The justifications of jihad listed above are valid but not inclusive. The Messenger of Allah ﷺ said: *"I was instructed to fight mankind until they testify that there is no one worthy of worship except than Allah, and that Muhammad is the Messenger of Allah, they establish Şalah and they pay Zakah. Whoever does so have protected from me his blood and his wealth"* [Bukhari and Muslim].

This *ĥadīth* declares that the Muslims have a mission to bring Islam to the

world and the application of this *ĥadīth* by the Saĥābah is the best explanation of it.

The first Caliph Abu Bakr (may Allah be pleased with him) fought against the apostates and against the two superpowers of his time, the Roman and Persian Empires. The war against the apostates was to reestablish the acceptance and submission of the tribes of Arabia to the law of Allah. Abu Bakr (may Allah be pleased with him) said if they refuse to give even a bridle they used to give to the Messenger of Allah ﷺ, he will fight them over it.

The wars with the Persian and Roman Empires were unprovoked and were for the prime purpose of spreading the truth to humanity. The Muslim messenger to the Persian leader said: "Allah has sent us to deliver the servants of Allah out of servitude of one another into the service of Allah, and out of the narrowness of this world into the vastness of both this world and the afterlife and out of the oppression of religions into the justice of Islam." There is no conciliatory tone in this statement and no inclination on part of its deliverer to live in "harmony" with followers of different religions. It was clear to the virtuous Muslims then, who had proper understanding of what their duties towards Allah were and who had pride in Islam, that all religions were false, and that all systems of government were oppressive, and that only Islam can offer mankind salvation in both this world and in the Hereafter. They understood that by approving others in their ways they are not doing them a favor, and they are not acting tolerantly towards them but they are doing them a disservice by not showing them the way of truth that would save them from eternal torment. Exceptions were made for the Jews and the Christians, where they were allowed to retain their religious practices as long as they paid the *jizyah* in a state of humility. They were made to know that their religious practices were false, that Islam does not approve of either Judaism or Christianity, and that they are considered to be misguided and are destined to Hellfire. The early Muslims let the Jews and the Christians know this in the clearest and most unambiguous manner. They did this out of concern and care for them.

Regarding their statement: "It is not legitimate to declare war because of differences in religion, or in search of spoils of war." This statement is false. The pagans of Arabia were fought because they were pagans, the Persians were fought because they were Zoroastrians and the Romans were fought because they were Christian. The great Muslim Sultan Mahmud Sabaktakeen fought against the Hindus because they were Hindus and he personally led his army in a risky campaign deep into the land of India with the sole objective of destroying the most revered idol in all of India. He was fighting because of this "difference of religion" our esteemed scholars of Mardin are discounting.

Allah ﷻ says: {**And fight them until there is no fitnah and [until] the religion, all of it, is for Allah**} [*al-Anfāl*: 39]

The Messenger of Allah ﷺ said: *"I was instructed to fight mankind until they testify that there is no one worthy of worship except Allah".*

Fighting *fī sabīlillāh* can also be for the objective of spoils of war. Most of the dispatches that the Messenger of Allah ﷺ sent from Madinah were in search of spoils of war. Badr itself was an expedition headed by Muhammad ﷺ himself in pursuit of a caravan of goods belonging to the Quraish.

In fact, the classical scholar Ibn Rajab al-Hanbali states that the purest and best form of sustenance for the believer is that of *ghanīmah* (spoils of war) because it was the source of living Allah has chosen for His most beloved of creation, Muhammad ﷺ.

The Messenger of Allah ﷺ said: *"My sustenance was made to be under my spear".*

It is known from the *sīrah* that the Messenger of Allah ﷺ lived off the fifth of the fifth of the spoils of war which was prescribed to him in the Qur'an. Throughout our early history, the greatest source of income for the Muslim treasury was through the revenue generated from fighting *fī sabīlillāh*. Spoils of war, *jizyah* (a tax taken from the Jews and Christians), and *kharaj* (a land toll taken from conquered land) represented the most important sources of income for the Islamic treasury.

The issue of Fatwas in Islam is a serious one. It is for this reason that scholars have drawn up stringent conditions/requirements for the Mufti (the authority issuing fatwas). Of these conditions is that he must be fully qualified in scholarly learning/knowledge. Of the conditions specific to the fatwa itself is having established the proper object of application (manat) according to place, time, and person, circumstance, and consequence/future outcome.

The notion of loyalty and enmity (al-walā' wa al-barā') must never be used to declare anyone out of the fold of Islam, unless an actual article of unbelief is held. In all other cases, it actually involves several types of judgment ranging according to the juridical five-fold scale: permissible, recommended, not recommended, non-permissible, and required. Therefore, it is not permissible to narrow the application of this notion and use it for declaring Muslim outside the fold of Islam.

Yes, *fatwa* is a serious matter and

should only be issued by those qualified. Hence, the Muslim masses today need to beware of any *fatwa* that calls for the re-interpretation of well grounded, accepted, and valid *fatwa's* given by the classical scholars of the past whom the *ummah* accepted and recognized as righteous men of knowledge. We are living in a time when the West has publicly stated that it will use Muslim against Muslim in the battlefield and will use scholar against scholar in the battle for the hearts and minds of the Muslim *ummah*. As one CIA official stated: "If you found out that Mullah Omar is on one street corner doing this, you set up Mullah Bradley on the other street corner to counter it".

Abdullah bin Mas'ood (may Allah be pleased with him) said: "Follow those who have passed away because the living is not secure from *fitnah* (trials that may cause a person to lose their religion)."

The early generations have formulated a framework for all the issues covered in this declaration: jihad, extremism, rules of leveling charges of *kufr* against a Muslim, and *al-walā' wa al-barā'*. Therefore, there is no need to re-interpret these core tenants based on what is clearly nothing more than an approval of a worldview as defined by those in power, i.e. the West.

In closing, one has to wonder as to why there was a great emphasis placed on the *fatwa* of Ibn Taymiyyah on Mardin by the issuers of this declaration. The *fatwa* of Ibn Taymiyyah was in-line with the opinions of the scholars before him and after him. So to believe that somehow the mujahidin are so dependent on this *fatwa* and are basing their jihad on it is not the case. Many, if not most, of the mujahidin have never even heard of it.

The media has also showed interest in the "New Mardin Declaration." Here are some of the headlines:
- Muslim scholars denounce Osama's jihad[4]
- Fatwa rules out violence, scholars say[5]
- Osama bin Laden misinterpreted jihad fatwa[6]
- Muslim scholars recast jihadist's favorite fatwa[7]

So why did the media in the West give this "New Mardin Declaration" more weight than it deserves? Is it some kind of breakthrough *fatwa* that would shake the foundations of the jihad of today? Not at all. This declaration is pretty much meaningless. Even the Mufti of Turkey, albeit for different reasons than what I mentioned, stated that it is "incredibly meaningless." This comes from a Turkish newspaper covering the event:

> But top Turkish religious leaders were notably absent from the gathering. Members of local Mardin press outlets speaking with Sunday's Zaman on the sidelines of the conference noted that many locals viewed the conference with suspicion before it even began. "People are worried that the conference sponsors are connected to the British government and that the whole thing is part of some sort of effort to use Muslims' own religious texts and resources to tie their hands when it comes to issues of jihad as defense. They're worried that the conclusion of the conference will be that jihad is no longer valid in our day and age -- and that this will rule out resistance even under situations of oppression such as that in Palestine today," one journalist said, speculating that the absence of some scholars could be due to their unwillingness to be associated with an event that might prove to be locally unpopular.

However, the marketing schemes used for this "Declaration" were pretty fascinating. They gathered from different countries and went all the way to Mardin, they held an entire conference to study the Mardin *fatwa*, and then the itinerary for the conference stated that the scholars were going to have a special session for the announcement of the "New Mardin Declaration" with all the scholars signing it as if it is some kind of great manuscript and then they are to pose together for a "group photograph" for this historical moment!

The reality of the matter is that the "New Mardin Declaration" is probably more relevant at scoring points for its signatories with the West, as is apparent by the Western media hailing it, than causing any change on the course of the modern jihad movement.

Closing Comments:

Our scholars should focus more on justice than on peace. A people who have their land occupied, their resources plundered by major Western corporations, their kings and presidents are stooges who have authority to oppress and steal but no authority to act independently of their Western masters, their children and women are fair play for American firepower; such a people do not need to hear needless sermons on Islam being the religion of peace. They need to hear how Islam will bring them justice and retribution. They want to hear how Islam can help them bring an end to occupation, how Islam can allow them to live in dignity under their own system of government, and ruled by their own people. They need to be empowered and encouraged. This is the message the Muslims are waiting to hear from our esteemed scholars.

The "New Mardin Declaration" is not worth the ink and the paper it is written on. It is a disgrace for those

4 (CNNi Report 01 April 2010)
5 (The Vancouver Sun 01 April 2010)
6 (ZeeNews.com 01 April 2010)
7 (Reuters News Agency 31 March 2010)

who agreed to take part in it, and has nothing to do with the *ummah* whom Allah described as being: {**...the best nation brought forth to humanity**}.

Determining the path for the future of the *ummah* was not left to our whims but was already set forth for us by the Messenger of Allah ﷺ. He said: *"A group of my ummah will continue fighting until the Day of Judgment"*. He also said: *"I was instructed to fight mankind until they testify that there is no one worthy of worship other than Allah"*. We stand firmly by these statements of our beloved Prophet ﷺ and we will, by the will of Allah, fight to uphold them and call others towards them. We stand firmly by the giant classical Imams of the *ummah* and we will not be deterred by the dwarfs of today, and we refuse all attempts of rewriting the Islamic shari'ah to kowtow to a New World Order that doesn't belong to us and must be challenged and changed.

Just as the *khilāfah* and the shari'ah rule were dismantled, we now see such dangerous attempts at dismantling the body of *fiqh* of our early scholars. This call to discard the *fatwa* of Ibn Taymiyyah should not be seen as merely a disagreement with ibn Taymiyyah on a particular point of legislation but as part of an orchestrated effort, under the sponsorship of the West, to discard the body of work done by centuries of scholarly work by the Imams of the *ummah*. But to put it that way is to put it mildly. It is in its essence a covert attempt at abrogating all the verses of Qur'an and hadith that call for the establishment of Islamic rule, fighting aggression, and fighting for the spread of the call of Islam. According to these scholars, these rules simply have no place in the modern world. According to them there is a New World Order that necessitates a New World *fiqh*. A *fiqh* of submission, a *fiqh* of rendering what is unto Caesar to Caesar, a *fiqh* that would allow the cowards to live in peace. It doesn't matter what quality of life they live as long as they are living.

Changing the status quo is not an easy task. Rocking the boat affects everyone. The Prophets experienced the consequences of challenging the status quo that was instituted and defended by the powerful. They suffered, and their followers suffered. But that did not deter them from carrying on their mission. Today the status quo is fiercely defended by the powerful and not everyone has the courage to go against it. If you defy it you suffer. You pay a price. Those who oppose the status quo see a powerful current and they are reluctant to cross it because, in the eyes of many, to go against the tide in today's world is insanity. Sadly, today many of our scholars have opted for the option of safeguarding themselves rather than safeguarding the religion. The problem is when this personal weakness is masked under the cloak of religion, and religion is used to justify a position that cannot be justified neither by our *fiqh* nor our history.

Jihad will continue in its various forms and fighting will continue until the Day of Judgment and will not be harmed or deterred by those who betray it.

Exhibit 2

Summer 1431 | 2010

INSPIRE

« ...And Inspire the Believers »

Periodical Magazine issued by the al-Qā`idah Organization in the Arabian Peninsula

May Our Souls be Sacrificed for You!

Shaykh Anwar al-`Awlakī

» Exclusive Interview with Shaykh Abū Basīr

» Make A Bomb in the Kitchen of your Mom
The AQ Chef

» Asrar al-Mujahideen 101
Terr0r1st

» The West should ban the Niqāb Covering its Real Face
Yaĥya Ibrāhīm

Al-Malahem Media Foundation - مؤسسة الملاحم للإنتاج الإعلامي

What to Expect in Jihād | 6 Calls of al-Anfāl | Jihādī Experiences

MAY OUR SOULS BE SACRIFICED FOR YOU!

SHAYKH ANWAR AL-`AWLAKI

If you have the right to slander the Messenger of Allāh ﷺ, we have the right to defend him. If it is part of your freedom of speech to defame Muhammad ﷺ it is part of our religion to fight you.

I would like to express my thanks to my brothers at *Inspire* for inviting me to write the main article for the first issue of their new magazine. I would also like to commend them for having this subject, the defense of the Messenger of Allāh ﷺ, as the main focus of this issue.

This effort, the effort of defending the Messenger of Allāh ﷺ, should not be limited to a particular group of Muslims such as the *mujāhidīn* but should be the effort of the *ummah*, the entire *ummah*. This is an issue that should unite the efforts of the Muslims worldwide.

When I delivered a lecture in defense of the Messenger of Allāh ﷺ almost two years ago, I anticipated that the cartoon controversies along with the Muslim response to them were not going to be some isolated incidents that

would just fade away. My prediction was that the West would continue escalating its attacks and would only entrench itself deeper into blasphemy. I expected this, because the hatred the West holds towards Islām and the Prophet of Islām ﷺ is a smoldering fire only waiting for an opportunity, a chance, to vent itself through a "proper" channel within the boundaries set by Western laws and freedoms.

Outrageous slander, blatant smearing of Muĥammad ﷺ, desecration of the Qur'ān, and the insulting of over a billion Muslims worldwide are done under the pretext of "freedom of speech". They are never called what they really are: a deeply rooted historic hatred for Islām and Muslims. Yesterday it was in the name of Christianity; today it is in the name of Democracy.

Allāh says: **(Hatred has already appeared from their mouths, and what their breasts conceal is greater)** [āl-`Imrān: 118].

For these reasons, for this combined effect of an escalating problem, I gave my lecture the title, *The dust will never settle down*.

Today, two years later, the dust still hasn't settled down. In fact the dust cloud is only getting bigger.

Whenever the affair calms down, someone somewhere in the Western world is sure to flare it up again. From 2005 onwards the cycle of offense is unabated.

What the West is failing to realize is that these attacks are also serving as a mobilizing factor for the Muslims and are bringing more and more Muslims to the realization that jihād against the West is the only realistic solution for this problem along with a host of other problems that cannot be cured without fighting in the path of Allāh.

Muslims do love Muĥammad ﷺ and do want to defend his honor and their methods of doing so are varying. Muslims protested and demonstrated worldwide. They burned flags and struck effigies. They boycotted products manufactured by some of the countries involved. All of these acts of good were a manifestation of the solidarity of Muslims in defense of the Messenger of Allāh ﷺ. On the other hand, there were some completely misguided efforts such as those of some of the callers to Islām who paid a visit to Denmark along with young Muslim boys and girls to start a dialogue in order to build bridges of understanding between the Muslims and the people of Denmark!

It is not enough to have the intention of doing good. One must do good in the proper way. So what is the proper solution to this growing campaign of defamation?

The medicine prescribed by the Messenger of Allāh ﷺ is the execution of those involved. A soul that is so debased, as to enjoy the ridicule of the Messenger of Allāh ﷺ, the mercy to mankind; a soul that is so ungrateful towards its Lord that it defames the Prophet of the religion Allāh ﷻ has chosen for his creation does not deserve life, does not deserve to breathe the air created by Allāh ﷻ and enjoy a life provided for by Allāh ﷻ. Their proper abode is Hellfire.

The Messenger of Allāh ﷺ called for the assassination of Kā`b bin al-Ashraf and there are other incidents of his companions killing those who spoke against him. There was a blacklist of names of people in Makkah that were to be killed even if found hanging on to the clothes of al Kā`ba, the holiest site in Islām. This list included, among others, women who sang poetry defaming Muĥammad ﷺ. Even though Muĥammad ﷺ prohibited the killing of women who are non-combatants, these women were an exception because of their unprecedented transgression.

There were some Muslim voices giving their interpretations as to why the US has not been involved in Europe's expression of hate. For myself it was only a matter of time before the US joins in. Now America has entered into the fray with full force. The 20th of May event overshadowed all what preceded it. America was the one missing link in

the chain. The chain is now full circle. The West has started this war and it will turn colossal. The West is awakening a sleeping giant.

We, by the will of Allāh will not back down from the defense of our beloved. We will fight for him, we will instigate, we will bomb and we will assassinate, and may our mothers be bereaved of us if we do not rise in his defense. It is the honor of the best of creation that is at stake and it is not much to set the world on fire for his sake.

To my Muslim brothers everywhere especially in the West: When the Ṣaĥāba, may Allāh be pleased with them, came back from a successful assassination mission against one of their enemies, the Prophet ﷺ met them on their return with a beaming face and said: «May these faces be successful». Who among you will be of those who will meet the Messenger of Allāh ﷺ on the Day of Judgment only to have him smile at you, pleased with your action, and hand you a drink from *al-Kauthar* because you rushed to his defense?

This is a golden opportunity to have the honor of performing an act in the service of Islām greater than any form of jihād. Defending the Messenger of Allāh ﷺ is a greater cause than fighting for Palestine, Afghanistan or Iraq; it is greater than fighting for the protection of Muslim life, honor or wealth. This is the pinnacle of all deeds and is waiting for the likes of Muĥammad bin Maslamah.

A cartoonist out of Seattle, Washington, named [redacted] started the "*Everybody Draw Mohammed Day*". This snowball rolled out from between her evil fingers. She should be taken as a prime target of assassination along with others who participated in her campaign. This campaign is not a practice of freedom of speech, but is a nationwide mass movement of Americans joining their European counterparts in going out of their way to offend Muslims worldwide. They are expressing their hatred of the Messenger of Islām ﷺ through ridicule.

The large number of participants makes it easier for us because there are more targets to choose from in addition to the difficulty of the government offering all of them special protection. But even then our campaign should not be limited to only those who are active participants.

These perpetrators are not operating in a vacuum. Instead they are operating within a system that is offering them support and protection. The government, political parties, the police, the intelligence services, blogs, social networks, the media, and the list goes on, are part of a system within which the defamation of Islām is not only protected but promoted. The main elements in this system are the laws that make this blasphemy legal. Because they are practicing a "right" that is defended by the law, they have the backing of the entire Western political system. This would make the attacking of any Western target legal from an Islāmic viewpoint. The entire Western system is staunchly protecting and promoting the defamation of Muĥammad ﷺ and therefore, it is the entire Western system that is at war with Islām. Assassinations, bombings, and acts of arson are all legitimate forms of revenge against a system that relishes the sacrilege of Islām in the name of freedom.

We will fight for him, we will instigate, we will bomb and we will assassinate, and may our mothers be bereaved of us if we do not rise in his defense.

Western freedoms of expression guarantee the defamation of Islām but do not guarantee the right to speak about issues such as the Holocaust. When the cultural editor at Jyllands-Posten who posted the Muĥammad ﷺ cartoons wanted to publish cartoons on the Holocaust, he was placed on indefinite leave and the editor in chief of the newspaper said that Jyllands-Posten under no circumstances would publish the Holocaust cartoons.

Now, with the defamation of Muĥammad ﷺ reaching the shores of America, I wonder whether the patriotic American Muslim will still have the audacity to claim that he enjoys the right to be a Muslim in America? Does he understand that this right includes his duty to fight against those who blaspheme his Prophet ﷺ?

We invite Muslims worldwide to stand up in defense of the Messenger of Allāh ﷺ and for their efforts to manifest in all appropriate means.

May Allāh make us of those who are honored with playing a part in the defense of the best of creation, Muĥammad ﷺ.

You may contact Shaykh Anwar through any of the emails listed on the contact page