SYMPOSIUM ARTICLES

IGNORING THE RULE OF LAW: THE COURTS AND THE GUANTANAMO DETAINEES

Erwin Chemerinsky*

Since January 2001, the United States government has held over 600 individuals as prisoners at a military facility in Guantanamo, Cuba. Several lawsuits have been brought on behalf of the detainees arguing that the government is violating international law and the United States Constitution. Unfortunately, thus far, the courts have dismissed these lawsuits on jurisdictional grounds.

Coalition of Clergy v. Bush involved a habeas corpus petition brought on behalf of the Guantanamo detainees by a group of clergy, lawyers, and professors. The federal habeas corpus statute expressly allows a habeas petition to be brought on “behalf of another.” 1 The petition asserted this authority to represent those who otherwise clearly have no access to the courts. Unfortunately, in November 2002, the United States Court of Appeals affirmed the dismissal of the case for a lack of standing, 2 and in May 2003, the United States Supreme Court denied certiorari. 3

Al Odah v. United States involved two suits which were consolidated in the federal court in the District of Columbia. 4 One case was brought by fathers and brothers of twelve individuals being held at Camp X-Ray in Guantanamo. The other case, filed as Rasul v. Bush, was brought by the father of an Australian detainee, the father of a British detainee, and the mother of another British detainee. In March 2003, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the case for lack of jurisdiction.

* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California. I served as co-counsel in Coalition of Clergy v. Bush, which is discussed in this article.
2. 310 F.3d 1153 (9th Cir. 2002).
In this article, I argue that these courts erred and that jurisdiction should be found in the federal courts to hear the claims that the United States government is violating American and international law. These cases present a question of profound importance: Can the United States government violate the law and in no court be held accountable? In bringing the detainees to Guantanamo and in housing them in small cages, the United States has violated basic principles of international human rights law that are binding on this country because of treaties it has ratified. In holding these individuals indefinitely without any hearing or any form of due process, the government is violating both the United States Constitution and international law.\(^5\)

The United States claims that its actions, no matter how unlawful, are not reviewable in any court. The courts so far have agreed and indeed have ruled that no court would have jurisdiction to hear a complaint challenging the legality of the government’s actions.

But this cannot be right. Long ago, in *Marbury v. Madison*,\(^6\) the Supreme Court stressed that we are a nation of laws and that no one, not even the President, is above the law. *Marbury* unequivocally held that it is the power and duty of the federal judiciary to provide a remedy, even against the executive, when rights of individuals are violated. Chief Justice John Marshall emphatically declared that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”\(^7\) The courts’ holding that federal courts cannot review the government’s action here, no matter how lawless, is at odds with the most fundamental precepts of the American system: the government is not above the law.

The importance of this issue for the United States cannot be overstated. How can this country expect foreign nations to follow international law in treating our citizens and soldiers if the

---

5. Subsequent to the symposium where this article was presented and the completion of this article, the United States Court of Appeals decided *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), in which it came to an opposite conclusion to the D.C. Circuit and held that federal courts do have jurisdiction to hear the claims of those in Guantanamo. Additionally, the Supreme Court granted review in *Al Odah v. United States*, *cert. granted*, 124 S.Ct. 534 (2003). Thus, it is likely that the Supreme Court will decide the issues discussed in this article by the end of June 2004.

6. 5 U.S. (1 Cranch) 137 (1803).

7. Id. at 163.
United States feels free to ignore it in treating those from foreign countries? How can this country purport to be a nation of laws if it simply disregards the law when that suits its purposes?

Perhaps, though not likely, a court in ruling on the merits of this petition will agree with the government. What this appeal raises is an even more basic question: Is the United States government free to violate the law immune from accountability in any court?

The United States government's position is that it is entitled to round-up people in a foreign country who may be guilty or may be innocent of being terrorists, forcibly bring them to American territory, put them in small cages, and hold them indefinitely without hearing or trial.

Part I of this article explains why the Ninth Circuit erred in *Coalition of Clergy v. Bush* in denying standing. Part II discusses why the D.C. Circuit was wrong in holding that there was not jurisdiction in any federal court to hear claims on behalf of the Guantanamo detainees.

I. STANDING

The usual rule is that individuals only may assert their own rights in a federal court and cannot present the claims of others, of third parties.8 But the Supreme Court repeatedly has held that the ban on third-party standing is prudential, not constitutional.9 As a prudential standing rule, Congress, by statute, can override it and authorize third-party standing.10

That is exactly what Congress has done in 28 U.S.C. § 2242. The statute could not be clearer in authorizing third-party standing: it states that a habeas corpus petition can be filed "by the person for whose relief it is intended or by someone acting in his

---

8. See, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975) ("the plaintiff generally must assert his own rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").


10. See, e.g., Department of Commerce v. United States House of Representatives, 525 U.S. 316, 328 (1999) (Congress has eliminated any prudential concerns by enacting a specific statute that authorizes standing); Bennett v. Spear, 520 U.S. 154, 162 (1997) ("unlike their constitutional counterparts, [prudential standing requirements] can be modified or abrogated by Congress"); Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 387 (3d ed. 2000) ("Congress may by statute eliminate prudential standing concerns.").
There are no qualifiers or limits within the statute. Congress's obvious concern was that the government might arrest people and hold them without access to the courts. Unless a habeas corpus petition could be brought on their behalf, no relief would be possible and there would be no way to insist that the government follow the law. That, of course, is exactly what Petitioners allege has occurred here: individuals are being held in an illegal manner without access to any court. On January 19, 2002, the Coalition of Clergy, Lawyers, and Professors filed a petition for habeas corpus on behalf of the prisoners in Guantanamo pursuant to this provision. The Coalition, as its title implies, is comprised of prominent rabbis, attorneys (including a former Attorney General of the United States), and professors from several disciplines. The Coalition's complaint said that it is dedicated to protecting the rights of the prisoners in Guantanamo who it believes are being held and treated in violation of the United States Constitution and international law.

The habeas corpus petition filed in the District Court alleges that the United States government violated basic principles of international human rights law in forcibly removing prisoners of war from Afghanistan, transporting them to Guantanamo, and holding them indefinitely in small outdoor cages. The petition alleges that the United States government is violating the requirements of both the United States Constitution and treaties binding on the United States by continuing to hold these individuals in Guantanamo without any semblance of due process. The habeas petition alleges that the prisoners in Guantanamo have no access to the courts. Their identities have not been disclosed; they have not been provided attorneys; they have no means of filing an action on their own behalf.

The United States Court of Appeals for the Ninth Circuit, however, affirmed the dismissal of the case on the ground that the members of the Coalition of Clergy lack a relationship with the detainees. The court stated:

We accept the Coalition's concern for the rights and welfare of the detainees at Camp X-Ray as genuine and sincere. Nevertheless, it has failed to demonstrate any relationship with the detainees, generally or individually. We therefore must con-

13. Id. at ¶¶ 3-4.
clude that even assuming the detainees are unable to litigate on their own behalf and even under the most relative interpretation of the "significant relationship" requirement the Coalition lacks next-friend standing.\textsuperscript{14}

There are several flaws with the court's conclusion. First, the statute, § 2242, does not contain any such requirement of a close relationship. Where the statutory language is clear, as it is here in permitting this habeas petition, there should be no need for further analysis.\textsuperscript{15}

Second, the Supreme Court never has interpreted § 2242 as requiring a close relationship. No Supreme Court case ever has held that § 2242 allows habeas petitions to be brought on behalf of others only when there is a close relationship between the petitioner and the detained individual. In fact, even the Supreme Court decision relied on by the district court does not state such a requirement. In \textit{Whitmore v. Arkansas},\textsuperscript{16} the Court articulated the requirements for "next friend" standing:

First, a next friend must provide an adequate explanation — such as the inaccessibility, mental incompetence, or other disability — why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate and it has been further suggested that a next friend must have some significant relationship with the real party in interest.

In other words, \textit{Whitmore v. Arkansas} states just two requirements: (1) an adequate explanation for why the real party in interest cannot appear on his own behalf; and (2) the next friend being dedicated to the best interests of the person on whose behalf the petition is brought.

The Court of Appeals does not deny that these factors are met in this case. The detainees in Guantanamo have no access to the courts; the government conceded this in the hearing in the district court. So far as is known, the detainees in Guantanamo do not speak English, do not know how to file papers in court, and have not been provided attorneys or the means of access to

\textsuperscript{14} 310 F.3d at 1162-63.
\textsuperscript{15} See United States v. Trident Seafoods Corp., 92 F.3d 855, 962 (9th Cir. 2000) ("If the statutory language is clear, we need look no further than that language in determining the meaning of the statute."), citing Hellon & Assoc., Inc. v. Phoenix Resort Corp., 958 F.2d 295, 297 (9th Cir. 1992).
American courts. A clearer denial of access is hard to imagine. Nor does the court question that Petitioners are “truly dedicated” to the best interests of those being detained.

*Whitmore v. Arkansas* states two requirements for “next friend” standing and these are met here; that should be sufficient for petitioners’ standing. But the Court of Appeals takes the language from *Whitmore*, that it has been “suggested” that there be a close relationship, and turns it into a rigid requirement. No Supreme Court decision ever has held that “next friend” standing is to be dismissed for lack of a close relationship if the two requirements stated in *Whitmore* are met.

Third, no Ninth Circuit case prior to *Coalition of Clergy v. Bush* ever has denied next friend standing in a situation where the individuals being held lack access to the courts. The court relied on language in *Massie ex. rel. Kroll v. Woodford*, that “the next friend [have] some close relationship” with the petitioner. But in *Massie* the habeas petition was dismissed because the prisoner could present his own petition, if he so desired, in federal court. *Massie* involved a journalist who filed a habeas corpus petition on behalf of a man on death row who chose not to challenge his impending execution. This Court stressed that there was no need for next friend standing because the prisoner could bring his own habeas corpus petition. This is obviously distinguishable from this situation in which individuals from a foreign nation are being held with no access to lawyers and no access to the courts.

Indeed, *every* Ninth Circuit case that has rejected “next friend” standing involves a situation in which the individual was deemed able to bring the petition for himself or herself. Thus, the language in *Massie* about the need for a close relationship is merely dicta that describes a situation not relevant to that case. Neither the government nor the district court points to a single case in which “next friend” standing was denied in which the prisoners lacked access to the courts.

---

17. 244 F.3d 1192, 1194 (9th Cir. 2001).
18. See, e.g., Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993) (mother lacked standing to bring habeas petition for her son because she failed to provide meaningful evidence that her son was incompetent to appear on his own behalf); Wilson v. Dixon, 256 F.2d 536 (9th Cir. 1958) (habeas petition denied because of failure to allege why inmate could not bring his own petition).
Nor should standing be denied in such an instance. The government and the Court of Appeals mistakenly call petitioners "intermeddlers." Petitioners would be intermeddlers if the detainees in Guantanamo could pursue their own habeas corpus petitions and chose not to do so. But since this is not the case here, petitioners were following the letter and spirit of § 2242 in presenting this claim.

Even more astounding is a concurring opinion by Judge Marcia Berzon. She wrote separately to say that the court did not need to address whether a significant relationship is always necessary and were the court to address that question, she "would be inclined to hold that a significant relationship is not always necessary." Judge Berzon said that the Coalition of Clergy failed to show that the detainees in Guantanamo lacked access to the courts and she said that the Coalition failed to try to communicate with those being held.

No one is allowed to visit the detainees in Guantanamo because travel to Cuba is illegal and Guantanamo is a closed military base. Those being held are not accorded any means of communication and the government has refused to provide them attorneys.

Those being held are individuals from a foreign nation most of whom likely do not speak English. They have no access to the courts in any way whatsoever. The absence of any lawsuit by the vast majority of those being held shows the flaw in Judge Berzon's argument. Why would those being detained in cages bring no challenge? Certainly it is not that they are pleased with their captivity. One prisoner yelled at a reporter being given a tour around the perimeter of the Guantanamo base: "We need the world to know about us. We are innocent here in this place. We've got no legal rights. Nothing. So can somebody know about us? Can you tell the world about us?" Those being held in cages in Guantanamo have not filed suit because the govern-

19. 310 F.3d at 1165 (Berzon, J., concurring).
20. See U.S. Clarifies Rights of Guantanamo Detainees, HERALD-SUN (DURHAM NC) at A3, April 18, 2002 ("In its latest rebuff to demands for an independent body to decide the legal status of captives held here, the United States said detainees have no right to lawyers and can be held as long as the U.S.-led war on terrorism lasts.").
ment will not allow them to communicate with lawyers and because they have no way to file a lawsuit on their own.

Judge Berzon, and the majority, express great concern that the Petitioners did not communicate directly with those in Guantanamo. But the judges offered no explanation for how Petitioners could do this. Travel by Americans to Cuba is prohibited. Even if Petitioners went to Cuba, Guantanamo is closed to the public. There is obviously no chance that Petitioners would be allowed access to the detainees. Nor is there any way to communicate with them because their names have not been released. Surely, the failure to communicate directly with the detainees cannot be used to support the government’s motion to dismiss when it is the government that is preventing all communication.

Under the literal language of the habeas statute, and its clear purpose in allowing next friend standing, the Coalition of Clergy should have been accorded standing to sue on behalf of those being held in Guantanamo.

II. JURISDICTION

*Odah v. United States* posed no standing issues because it involved suits brought by family members on behalf of those being held in Guantanamo. However, the United States Court of Appeals for the District of Columbia Circuit ruled that it lacked jurisdiction — and that no court in the United States would have jurisdiction to hear the claims of those held in Guantanamo.

The Court of Appeals based this conclusion on the Supreme Court’s decision in *Johnson v. Eisentrager*. In *Johnson*, twenty-one German nationals sought habeas corpus after they were arrested in China for working in Japan on behalf of the German government before Germany surrendered on May 8, 1941. They were taken into custody by the United States Army and convicted by a United States Military Commission of violating laws of war by engaging in continued military activity in Japan after Germany’s surrender, but before Japan had surrendered. The defendants were convicted and repatriated to Germany to serve their sentences in a prison whose custodian was an American army officer. The prisoners sought habeas corpus in federal

---

22. 321 F.3d at 1141.
court and the Supreme Court found that there was not jurisdiction in a federal district to hear the petition.

The D.C. Circuit found that the Guantanamo detainees are like the petitioners in *Johnson* and thus held that the petition in this case be dismissed. The Court of Appeals, however, erred because this case is different from *Johnson v. Eisentrager* in many important respects.

First, in this case, unlike *Johnson*, the prisoners were brought to American territory. The Court in *Johnson* repeatedly emphasized that the prisoners there were never within American “territory.” The Court noted that an “alien’s presence within its territorial jurisdiction . . . [gives] the Judiciary power to act.”24 Indeed, the Court quoted *Yick Wo v. Hopkins*,25 as holding that the Constitution’s protections apply “to all within the territorial jurisdiction.” The Court in *Johnson* said that habeas corpus was not available because “these prisoners at no relevant time were within any territory over which the United States is sovereign.”26

But the United States government, by transporting the detainees to Guantanamo, has brought them within the “territorial jurisdiction” of the United States. The Lease Agreement between the United States and Cuba entered into in 1903, and included in a 1934 treaty between these two nations, is clear that Guantanamo is under the exclusive control of the United States and is United States territory.27 Article III of the Lease Agreement states:

While on the one hand the United States recognizes the continuance of ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over said areas.28

24. *Id.* at 771.
28. Agreement, *supra* note 26, art. III.
The phrase "ultimate sovereignty" being in Cuba should not be viewed as giving Cuba sovereignty over Guantanamo while it is under American control. The treaty simply says that when the United States relinquishes Guantanamo, sovereignty will revert to Cuba; it does not mean that Guantanamo now is under the sovereignty of Cuba. The government's own interpretation of the treaty says exactly this:

'Ultimate' meaning final or eventual, is a key word here. It is interpreted that Cuban sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba.29

In every possible way, Guantanamo is the territory of the United States and within this country's sovereign control. Again, the government's own publication concedes this: "It is clear that at Guantanamo Bay we have a Naval reservation, which for all practical purposes, is American territory. Under the foregoing agreements, the United States has for approximately fifty years exercised the essential elements of sovereignty over this territory without actually owning it."30 Cuba obviously could not release the prisoners in Guantanamo; they are entirely under the control of the United States. This, of course, is the very definition of sovereignty.31

Johnson v. Eisentrager is clear that those within United States territory are entitled to habeas corpus. By transporting the prisoners to Guantanamo, the United States brought them to territory under the United States' sovereign control and thus under the reasoning of Johnson itself habeas corpus must be available.

Second, Johnson v. Eisentrager emphasized that the prisoners there had been accorded hearings and due process, something not in any way provided to the prisoners in Guantanamo. In Johnson, the prisoners were tried in military courts and given the

30. Id.
31. See, e.g., R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 964 (4th Cir. 1999) ("The sovereign limits of a nation are defined by those territorial boundaries within which it exercises supreme and exclusive power.")
opportunity to have their habeas corpus petitions heard in federal court. The Court noted,

[The doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their support and to show some reason why they should not be subject to the usual disabilities of non-resident enemy aliens.]

But the prisoners in Guantanamo have not been accorded any hearing. They are being detained without any semblance of due process as required under the United States Constitution and international law. This is very different from how the prisoners in Johnson were treated.

Third, Johnson arose in the context of a declared war and the Court gave this great emphasis in allowing foreign soldiers to be denied habeas corpus; there is no declared war against Afghanistan or any other nation. The Court in Johnson invoked the Alien Enemy Act of 1798, to support its conclusion that habeas corpus need not be provided. But that law applies when there is a declared war. Thus, it is very significant that Johnson's holding relies on a statute which requires a declared war, something present in that case, but not this one. For all of these reasons, Johnson is distinguishable from this case and the D.C. Circuit erred by relying on it to dismiss this petition.

Moreover, the D.C. Circuit's conclusion, that Johnson v. Eisentrager precluded any federal court from hearing a petition from those being held in Guantanamo, conflicts with many decisions that statutes should be interpreted to ensure that some court has jurisdiction. The Supreme Court repeatedly has made it clear, especially in the half century since Johnson, that a federal statute which precluded every federal court from exercising jurisdiction would raise grave constitutional problems. Thus, the Court always has gone out of its way to interpret statutes that appear to foreclose all jurisdiction to allow a federal court to hear a matter.

32. 339 U.S. at 780-781.
34. See 339 U.S. at 775 ("The resident enemy alien is constitutionally subject to summary arrest, internment, and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act.")
For example, in *Oestereich v. Selective Service System Local Board No. 14*, the Court interpreted a provision that said that there would be "no judicial review" of Selective Service classifications as not barring review because it "is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims." Similarly, in *McNary v. Haitian Refugee Center, Inc.*, the Court interpreted a law that appeared to preclude judicial review of dispositions of applications for amnesty. The Court said that there is a "well-settled presumption favoring interpretation of statutes [to] allow judicial review" and said that "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review."  

Most recently and most importantly, in *United States v. St. Cyr*, the Supreme Court interpreted the habeas corpus statute to allow those facing deportation to have habeas corpus access to the American courts, even though the statutory language appeared to preclude all review including via a writ of habeas corpus. The Court stated: "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."  

The Court said that to interpret the habeas statute to preclude any petition in any court would raise serious constitutional issues. The Court thus interpreted the law, despite its language to the contrary, to allow those facing deportation to have access to habeas corpus. The Court concluded: "A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."  

The D.C. Circuits' approach interprets the habeas corpus statute to preclude all petitions by those held in Guantanamo. This is inconsistent with the large body of case law holding that

35. 383 U.S. 233, 243-244 n.6 (1968) (Harlan, J., concurring).  
39. Id. at 299-300 (citations omitted).  
40. Id. at 300.
statutes must be interpreted to allow some federal court jurisdiction absent a clear statement from Congress to the contrary. No such statement exists here and based on this case law the District Court erred in holding that no court could hear this petition.

Finally, the D.C. Circuit's conclusion of no jurisdiction is in error because treaties ratified by the United States require that habeas corpus be available to those held in Guantanamo. In *Johnson v. Eisentrager*, the Supreme Court emphasized that the denial of habeas corpus to the German prisoners did not violate any treaty to which the United States was then a party. 41 In fact, the Court devoted several pages of its opinion to explaining why the United States' actions were in accord with international law and treaties binding the nation. However, since *Johnson* was decided over 50 years ago, the United States has ratified treaties which require that habeas corpus be available to all held by the United States.

Specifically, the International Covenant of Civil and Political Rights, ratified by the United States in 1992, states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention." 42 Also, the treaty provides that "[n]o one shall be subjected to arbitrary arrest and detention." 43 The United States approved these provisions without reservation. 44

The federal habeas corpus statute should be interpreted in accord with this treaty to allow the petition brought in this case. The habeas corpus statute specifically authorizes petitions by those who are held in violation of treaties of the United States. 45

Moreover, the law is clear that federal laws, including the habeas statute, must be construed to be in accord with international law. This Ninth Circuit, for example, recently spoke of the "well-established Charming Betsy rule of statutory construction which requires that we generally construe Congressional legisla-

41. 339 U.S. at 786-791.
43. *Id.* art. 9(1), 999 U.N.T.S. 171.
45. 28 U.S.C. § 2241(c)(4).
tion to avoid violating international law.”46 Treaties ratified by the United States contain a “clear international prohibition” against arbitrary and prolonged detention.47

Therefore, in light of the express provisions of Article IX of the International Covenant of Civil and Political Rights, habeas corpus must be available to the prisoners in Guantanamo. No such provision existed at the time of Johnson v. Eisentrager which makes its analysis and holding inapplicable to the Guantanamo detainees.

III. CONCLUSION

The actions of the government in holding the Guantanamo detainees strikes at the very heart of the rule of law. The government claims that its actions, no matter how egregious or how much in violation of the law, cannot be reviewed in any court. But this conflicts with the most basic principle of American government: no one, not even the President, is above the law and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”48

46. Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001). See also Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984).
47. Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998).