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Assessing the Petition Brought by a Coalition of Clergy,  
Lawyers, & Professors on Behalf of Detainees Held by  
the U.S. Military in Guantanamo Bay, Cuba**



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**Wrong Claim, Wrong Party, Wrong Court:  
Assessing the Petition Brought by a Coalition of Clergy, Lawyers, & Professors  
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By  
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“In this case, the wrong claim was brought by the wrong party in the wrong jurisdiction.” That opening line, from D.C. Circuit Judge Harry Edwards’ 1998 opinion in *Alamo v. Clay*,<sup>2</sup> a case in which a church congregation sought to have their pastor released from prison, perfectly describes the habeas corpus petition filed in United States District Court for the Central District of California on January 20 by a coalition of clergy, lawyers, and professors, ostensibly on behalf of the incarcerated Taliban and al Qaeda prisoners currently being held by the U.S. Military in Guantanamo Bay, Cuba. As the District Court rightly held in its order dismissing the petition,<sup>3</sup> the self-styled group of civil rights lawyers who brought the petition have no standing; the Central District of California has no territorial jurisdiction over persons being detained in Guantanamo Bay; and, indeed, the U.S. Constitution’s guarantee of the writ of habeas corpus does not extend to non-citizens beyond the borders and sovereign authority of the United States.

First, standing. As every law student knows, the general rule, arguably mandated by Article III of the Constitution, is that only persons with particularized harms have standing to commence a lawsuit. Such a person “must allege an injury to himself that is

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<sup>2</sup> 137 F.3d 1366, 1367 (D.C. Cir. 1998).

<sup>3</sup> Order Dismissing Petition for Writ of Habeas Corpus, No. CV-02-570 (Feb. 21, 2002), *appeal pending*, 02-55367 (9<sup>th</sup> Cir.).

‘distinct and palpable.’”<sup>4</sup> He must show that he personally has suffered some actual or threatened injury.<sup>5</sup> Not one of the individuals who filed the habeas petition even alleged any such particularized harm to himself, much less demonstrated it. Instead, the petition merely sets out that they are clergy, professors, former newspaper reporters and editors, most of whom live in Southern California, who all apparently share a concern about the legality and/or propriety of the confinement of prisoners in Guantanamo Bay.

There are, of course, exceptions to the particularized harm requirement, and the Clergy Coalition appears to have based its claim on one such exception. The Supreme Court has long recognized “next friend” standing, a doctrine that allows suit to be filed by “next friends” on behalf of persons who are incapable of bring the suit themselves, usually because of mental incompetence, minority, or lack of access to the courts. The Court has traced the doctrine back to the English Habeas Corpus Act of 1679, which authorized complaints to be filed by “any one on . . . behalf” of detained prisoners.<sup>6</sup> The English House of Lords followed suit in 1704, recognizing “that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.”<sup>7</sup> Although early versions of the American habeas corpus statutes required that applications for the writ be “signed by the person for whose relief it [was] intended,”<sup>8</sup> some courts interpreted the statutes to provide for “next friend” standing,<sup>9</sup> and

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<sup>4</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

<sup>5</sup> *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>6</sup> *Whitmore*, 495 U.S. at 162 (citing 31 Car. II, ch. 2).

<sup>77</sup> *Whitmore*, 494 U.S. at 162 (citing *Ashby v. White*, 14 How. St. Tr. 695, 814 (Q.B. 1704)).

<sup>8</sup> See, e.g., *id.* at 162 n.3 (quoting Rev. Stat. § 754, 28 U.S.C. § 454 (1940 ed.)).

the current version of the federal habeas statute explicitly permits petitions to be signed and verified either by the person for whose relief it is intended “*or by someone acting on his behalf*,”<sup>10</sup> thus codifying the “next friend” doctrine.

The “next friend” doctrine is relatively narrow, however. It does not give a roving commission to anyone claiming to be acting on the “behalf” of detained persons. Rather, persons seeking to establish “next friend” standing must meet a fairly high threshold. They must provide an adequate explanation as to why the real party in interest cannot prosecute the suit on his own behalf.<sup>11</sup> They must be truly dedicated to the best interests of the real party in interest.<sup>12</sup> And, quite likely, they must have a significant relationship with the real party in interest.<sup>13</sup> As the Supreme Court noted in *Whitmore*, the doctrine was never intended to allow suits by “intruders or uninvited meddlers.”<sup>14</sup>

The Clergy Coalition baldly alleges in its petition that the Respondents—including the President of the United States, the Secretary of Defense, Chairman of the Joint Chiefs of Staff, the Secretary of the Navy and Commandant of the Marine Corps, as well as the officers in command of the U.S. Naval base at Guantanamo Bay—have denied the Guantanamo Bay prisoners “access to the United States Courts.” The Coalition apparently based its allegation on certain media accounts, despite the fact that

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<sup>9</sup> See, e.g., *Collins v. Traeger*, 27 F.2d 842, 843 (9<sup>th</sup> Cir. 1928); *United States ex rel. Funaro v. Watchorn*, 164 F. 152, 153 (S.D.N.Y. 1908).

<sup>10</sup> 28 U.S.C. § 2242.

<sup>11</sup> *Whitmore*, 495 U.S. at 163 (citing *Wilson v. Lane*, 870 F.2d 1250, 1253 (7<sup>th</sup> Cir. 1989); *Smith ex rel. Missouri Public Defender Comm’n v. Armontrout*, 812 F.2d 1050, 1053 (8<sup>th</sup> Cir. 1987); *Weber v. Garza*, 570 F.2d 511, 513-514 (5<sup>th</sup> Cir. 1978)).

<sup>12</sup> *Id.* (citing *Morris v. United States*, 399 F. Supp. 720, 722 (E.D. Va. 1975)).

<sup>13</sup> *Id.* (citing with approval *Davis v. Austin*, 492 F. Supp. 273, 275-276 (N.D. Ga. 1980)).

<sup>14</sup> *Id.* at 164.

other media outlets have reported that the detainees have access to the mails, and have been able to meet with representatives of the International Red Cross and even representatives of their home countries. Any lack of access to U.S. Courts seems more a function of the fact that Guantanamo Bay is not within the sovereign jurisdiction of the United States than of any improper conduct by U.S. officials (a point addressed more fully below). As a result, the lack of access at issue here does not be of the kind contemplated by the “next friend” doctrine.

Even more problematic for the Clergy Coalition is the third requirement for “next friend” standing. Although the Supreme Court in *Whitmore* did not expressly hold that a significant relationship is required, it cited with approval a case from the Northern District of Georgia in which the court held that a minister and first cousin of a prisoner did not have a significant enough relationship with the prisoner to be able to claim next friend standing.<sup>15</sup> It likewise cited with approval the concurring opinion of Justice Jackson, on behalf of *six* members of the Court, in *Rosenberg v. United States*, in which the Court “disapprove[d]” the granting of “next friend” standing to a stranger to the litigation, holding that such standing “cannot be justified” in the circumstances of the case, nearly identical to the circumstances at issue in the current case under review.<sup>16</sup> And it noted that if “[*t*]hese limitations” on next friend standing—all three of them—were not recognized, “intruders and uninvited meddlers, styling themselves as next friends” and “asserting only a generalized interest in constitutional governance could

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<sup>15</sup> *Id.* (citing *Davis v. Austin*, 492 F. Supp. 273, 275-76 (N.D. Ga. 1980)).

<sup>16</sup> *Id.* (citing *Rosenberg v. United States*, 346 U.S. 273, 291-92 (1953) (Jackson, J., concurring with five other Justices)).

circumvent the jurisdictional limits of Article III simply by assuming the mantle of ‘next friend.’”<sup>17</sup>

There is not one word in the petition even suggesting, much less demonstrating, that the Clergy Coalition petitioners have *any* relationship with the Guantanamo Bay prisoners, much less a significant one. Indeed, the petition asserts just the opposite, acknowledging that the detainees have not even been “identified.” “Next friend” standing has never been stretched so far; in short, the Clergy Coalition is simply the wrong party for this suit.

Subsequent events have brought the reason for this common-sense limitation on “next friend” standing into sharp relief. Two days before the District Court for the Central District of California issued its order dismissing the petition, a lawsuit was filed in the United States District Court for the District of Columbia on behalf of three Guantanamo Bay detainees by legitimate “next friends”—the detainees’ parents! That litigation, brought by representatives of the detainees’ own choosing, would be barred if the claims of “next friend” standing made by the Clergy Coalition had been upheld. Indeed, the Central District of California’s alternative dismissal on the merits would bar all related claims by Guantanamo Bay detainees—even those brought by the detainees themselves—under the principles of *res judicata*. When confronted with that possibility during a nationally-broadcast radio program, Clergy-Coalition petitioner Erwin Chemerinsky contended that *res judicata* did not apply because the detainees had never had the opportunity to be heard. But that is precisely why the Clergy Coalition lacked standing to bring any claim on the detainees’ behalf in the first place!

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<sup>17</sup> *Id.*

Second, jurisdiction in California. Even assuming that a U.S.C. law professor, southern California clergyman, or a former editor of the Los Angeles Times somehow had a significant relationship with the al Qaeda prisoners, the District Court for the Central District of California did not have jurisdiction to hear the habeas petition the Clergy Coalition sought to bring on the detainees' behalf. In portions of the federal habeas statute tellingly omitted from the petition, Congress has clearly established territorial limits to the habeas jurisdiction of the federal courts. Section 2241(a) of Title 28 provides that "[w]rits of habeas corpus may be granted by . . . the district courts and any circuit judge *within their respective jurisdictions.*"<sup>18</sup> And when a habeas petition is entertained by a circuit judge, any ensuing order "shall be entered in the records of the district court *of the district wherein the restraint complained of is had.*"<sup>19</sup>

This obvious territorial limitation was deliberate. As the Supreme Court has previously noted, Congress concluded that it would be "inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with the authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat."<sup>20</sup> Early interpretations by the Supreme Court required that *both* the detainee and his custodian be found within the court's territorial jurisdiction.<sup>21</sup> The Court subsequently overruled that interpretation, but still requires that the custodian be found within the district court's territorial

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<sup>18</sup> 28 U.S.C. § 2241(a); *compare* Petn. at 5 (emphasized phrase omitted).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Carbo v. United States*, 364 U.S. 611, 617 & n.12 (1961) (citing Cong. Globe, Part 1, p. 730; Part 2, pp. 790, 899, 39<sup>th</sup> Cong., 2d Sess.), *cited in* Government's Br. in Opp. To habeas petition, *Coalition of Clergy v. Bush*, No. CV-02-570 (filed Jan. 31, 2002).

<sup>21</sup> *Ahrens v. Clark*, 335 U.S. 188 (1948).

jurisdiction.<sup>22</sup> Because the petition did not even allege, much less demonstrate, that anyone in the chain of command over the custodians of the Guantanamo Bay prisoners is to be found in the territorial jurisdiction of the Central District of California, there District Court quite properly recognized that it did not have jurisdiction to entertain the petition.

Third, jurisdiction in other U.S. Courts. Nor is there jurisdiction in any other U.S. Court. Because the Supreme Court has interpreted the territorial requirement to afford jurisdiction over the custodian or the custodian's superiors, an argument might be made that *some* court in the United States might have jurisdiction—perhaps the Eastern District of Virginia, in which territory the Pentagon is located, or the Southern District of Florida, where the immediate superior in the military chain of command over Guantanamo Bay is located, or even the District Court for the District of Columbia, where the Commander-in-Chief resides. But even petitions filed in one of these courts, such as the petition filed last month in the District Court for the District of Columbia, must be dismissed under existing Supreme Court precedent.<sup>23</sup> In *Johnson v. Eisentrager*,<sup>24</sup> the Supreme Court held that the courts of the United States have no jurisdiction to consider habeas corpus petitions filed on behalf of non-resident aliens being held outside the sovereign territory of the United States.

By treaty, the Guantanamo Bay Naval Base is leased from the government of Cuba. The Treaty gives to the United States “complete jurisdiction and control over and

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<sup>22</sup> *Braden v. 30<sup>th</sup> Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-95 (1973).

<sup>23</sup> For this reason, the Central District of California court dismissed the Clergy Coalition petition rather than merely transferring it. There simply was no court of the United States with jurisdiction to accept the transfer.

<sup>24</sup> 339 U.S. 763 (1950).



within” Guantanamo Bay, but it expressly provides—in a portion telling omitted from the Clergy Coalition’s petition—that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over” Guantanamo Bay.<sup>25</sup>

That sovereignty provision, in conjunction with the binding precedent of the Supreme Court’s decision in *Johnson v. Eisentrager*, was dispositive for the Central District of California, and it should be dispositive for any U.S. Court entertaining a habeas petition on behalf of Guantanamo Bay detainees; indeed, Central District Judge Matz viewed the Clergy Coalition’s omission of the critical treaty language as effectively a concession that the Clergy Coalition itself recognized that it was dispositive.

*Johnson* actually stands for much more, however. In a passage discussing the distinction between resident friendly aliens (citizens of nations at peace with the United States, residing temporarily in the United States) and resident enemy aliens (citizens of nations at war with the United States, residing temporarily in the United States), the Supreme Court noted that “Executive power over enemy aliens, *undelayed and unhampered by litigation*, has been deemed, throughout our history, essential to war-time security.”<sup>26</sup> Thus, even enemy aliens *residing in the United States* are “constitutionally subject to summary arrest, internment and deportation whenever a ‘declared war’ exists.”<sup>27</sup> Courts will entertain his plea for freedom from Executive custody only to ascertain the

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<sup>25</sup> Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418, *reprinted in* 6 Bevens 1113-15; *see also Cuban American Bar Ass’n v. Christopher*, 43 F.3d 1412 (11<sup>th</sup> Cir. 1995).

<sup>26</sup> 339 U.S. at 774 (emphasis added).

<sup>27</sup> Much will undoubtedly be made of the fact that Congress has not formally “declared” war against any nation. The Congressional authorization of force arguably constitutes a sufficient declaration of war, but even if it does not, there is no question that war has been declared on the United States, in a very visible and notorious manner. Those who are compatriots with the terrorist organization that launched that war are therefore clearly “enemy aliens” as contemplated by the *Johnson* Court.

existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.”<sup>28</sup>

Indeed, the old common law rule was that a resident enemy alien had no standing to maintain *any* action “in the public courts of the enemy nation,” not just challenges to the legality of his internment.<sup>29</sup> Although the renowned New York jurist Chancellor Kent modified that common law rule to provide resident aliens a more generous access to our courts for the resolution of pre-war contract disputes, the *Johnson* Court recognized that certain limitations on access to the courts by resident enemy aliens remained—limitations that clearly apply to the current circumstances: “The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.”<sup>30</sup>

The *Johnson* Court took the Court of Appeals to task for extending to *non-resident* enemy aliens “a right to use our courts, free even of the limitation we have imposed upon resident alien enemies, to whom we deny any use of our courts that would hamper our war effort or aid the enemy.”<sup>31</sup> More fundamentally, the Court recognized just how great an intrusion upon the war-making power judicial oversight in this area would be:

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<sup>28</sup> *Id.* at 775 (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948)).

<sup>29</sup> *Id.* (citing *Griswold v. Waddington*, 16 Johns. 438, 477 (N.Y. 1819) (opinion by Chancellor Kent, apparently joined by Joseph Story)).

<sup>30</sup> *Id.* at 776 (quoting *Ex parte Kawato*, 317 U.S. 69 (1942)).

<sup>31</sup> *Id.* at 778.

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.<sup>32</sup>

Thus, the *Johnson* Court simply recognized the obvious—that to permit judicial oversight of military commanders in times of war was not only unwise, but an unwarranted intrusion into the activities of the branch of government with primary responsibility for the security of the United States in times of war.

Finally, the *Johnson* Court recognized that the due process protections afforded by the Fifth Amendment to all “persons” had to be read in light of the “full text” of that Amendment, which expressly exempts “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>33</sup> To hold that the Fifth Amendment required trial in civilian courts rather than military courts would amount “to a right not to be tried at all for an offence against our armed forces,” noted the Court, for the Sixth Amendment’s requirement that in all criminal prosecutions the accused shall be tried by an impartial jury of the State and district wherein the crime shall have been committed would prohibit even civilian trial for crimes committed against our armed

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<sup>32</sup> *Id.* at 779.

<sup>33</sup> *Id.* at 782.

forces abroad. And it would, inexplicably, put enemy aliens “in a more protected position than our own soldiers” who, once conscripted into the military service, are “stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.”<sup>34</sup>

In short, there is good reason for the conclusion that not just the Central District of California but no federal court has jurisdiction to entertain a petition for a writ of habeas corpus whether filed directly by the Guantanamo Bay detainees themselves or by self-proclaimed “next friends” acting on their supposed behalf. This is clearly true as long as the detainees are not brought within the territorial jurisdiction of the United States. And even for those terrorists who are brought to the United States or captured here, the jurisdiction of the federal courts would be limited to ascertaining whether the petitioners are really alien enemies. “When that appears,” noted the Supreme Court in *Johnson*, “those resident here may be deprived of liberty by Executive action without hearing.”<sup>35</sup> This power has been recognized since time immemorial as incident to the law of nations and the laws of war, and nothing in the U.S. Constitution, treaties, or subsequent case law has altered the fundamental and common-sense conclusion that, in times of war, a nation’s enemies are not entitled to have their claims heard in the courts of the nation with which they are at war.

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<sup>34</sup> *Id.* at 783 (citing *Humphrey v. Smith*, 336 U.S. 695 (1949); *Wade v. Hunter*, 336 U.S. 684 (1949)).

<sup>35</sup> *Id.* at 784 (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948)).



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