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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

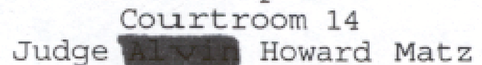
COALITION OF CLERGY, LAWYERS, AND PROFESSORS, HAIM DOV BELIAK, ROBERT A. BERGER, KATHRYN S. BLOOMFIELD, ERWIN CHEMERINSKY, RAMSEY CLARK, ALLEN FREEHLING, STEVEN JACOBS, HAROLD S. LEWIS, JR., HUGH R. MANES, ARTHUR L. MARGOLIS, KENNETH B. NOBLE, GEORGE REGAS, JOSEPH REICHMANN, LAWRENCE W. SCHILLING, CAROL A. WATSON, MARION R. YAGMAN, and STEPHEN YAGMAN, on behalf of PERSONS HELD INVOLUNTARILY AT GUANTANAMO NAVAL AIR BASE, CUBA,

Petitioners,

No. Civ.-02-00570-AHM(JTLx)

RESPONSE TO RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE REGARDING JURISDICTION[1]

February 14, 2002
1:30 p.m.
Courtroom 14
Judge Alvin Howard Matz



[1] It is noted that respondents also styled their submission as a "motion to dismiss for lack of jurisdiction." Petitioners do not address respondents' response insofar as it purports to be a motion to dismiss, because the court did not direct such a motion be made, and also because the making of such a motion would be, and here is, clear and blatant violation Local Rule 7-3 of this court.

vs.

GEORGE WALKER BUSH, DONALD H. RUMSFELD, RICHARD B. MYERS, GORDON R. ENGLAND, JAMES L. JONES, ROBERT A. BUEHN, MICHAEL FAIR, ELLEN MUSTAIN, MICHAEL LEHNERT, and 1,000 UNKNOWN NAMED UNITED STATES MILITARY PERSONNEL,

Respondents.

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MEMORANDUM OF LAW

1. INTRODUCTION: **SHAKESPEARE, A RECIPE FOR TYRANNY, AND LUCIFER IN NEED OF SOME RESTRAINT**

Now is a sad time in American history, a time at which America has been targeted by domestic terror from without and when our American, democratic government and its leaders arrogantly abuse the danger of more terror to come and the shibboleth of war that has ended to abridge our Constitution and to deny its protections to all who seek them. It is a time when bad people have strong urges to let their ends justify their means. It is sad that American government troops in its minions of lawyers -- not the lawyers of whom William Shakespeare in *King Henry VI* remarked "The first thing we do, let's kill the lawyers[]"* -- but instead that not so intrepid flock of government gulls and toadies -- assistant United States Attorneys all -- who will do the political leaders' bidding, damn the Constitution, no matter what they do may be wrong, who march in lockstep line whenever ordered to do so, and in violation of their oaths of office to support and uphold our Constitution, no matter what.

As with all bad, mean-spirited government action, when that action is challenged, the government does not respond on the merits, but first tries mightily, as here, to avoid answering at

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* *King Henry VI*, IV, ii, 86. The phrase commonly is misunderstood to mean that lawyers generally are a pain in the neck, and then it is used pejoratively as a means to disparage lawyers. In fact, and in its context, what Shakespeare communicated was that those who would seize governmental power to do their own wills or to do evil, first would want to get rid of lawyers, because lawyers would be the only persons who would oppose tyranny and who would stand in the way of oppression.

the bar of justice: it says, as here, to the federal courts, "you don't have any jurisdiction and those rabble who come here for relief are 'meddlers.'" Shame on respondents who say that and double shame on their lawyers who say that.

This arrogant, attempted avoidance, respondents' claim that the executive branch of American government somehow is above its own laws, is a recipe for tyranny and is inconsistent with American democracy, a democracy in which the executive branch of government of the United States of America never should suggest to the judicial branch of government that the latter may not sit in judgment on the acts of the former.

Through the ages, evil has manifested itself in various forms, *e.g.*: "I watched as Pilate washed his hands and sealed his [Jesus Christ's] fate;" "I watched as kings and queens fought ten decades for the gods they made [The Hundred Years' War];" "I rode a tank in a general's rank, while the ***blitzkrieg*** raged and the [Jews'] bodies stank [burning in concentration camps in the Holocaust];" "I shouted 'who killed the Kennedys?,' when after all it was you and me."[*] The advice given by Lucifer, himself was that "I'm in need of some restraint."[*]

Today, our bold American, war mongering, macho, and swaggering government and respondents are in need of some restraint. That restraint must come, if it will come at all, from its own courts and in this action, and for the obvious reason: it is fundamentally against our morals and principles as

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[*] *Sympathy for the Devil*, Mick Jagger and Keith Richards, 1967.
[*] *Ibid.*

a people to grab up foreigners in a foreign land we invaded, who apparently were defending their own country, bind them hand and foot, gag them, blindfold them, put hoods over their heads, drug them, bring them *en masse* and under force of arms to a part of another alleged foreign land we occupy against the will of its people, to kneel in outdoor wire cages garbed in ear muffs, clouded goggles, *etc.*, because we deign to do so, and damn the law, domestic and international and all international opinion to the contrary. Our governments,' respondents' conduct is not that of democrats, but are acts of tyrants that must be condemned. And we do condemn them and their perpetrators.

2. OF COURSE, AMERICAN FEDERAL COURTS HAVE JURISDICTION TO DECIDE THE ISSUE OF WHETHER THE AMERICAN GOVERNMENT -- RESPONDENTS -- VIOLATE THE DETAINEES' CONSTITUTIONAL RIGHTS BY THEIR UNCONSTITUTIONAL DETENTIONS.

A. THIS COURT HAS JURISDICTION TO DETERMINE THE ISSUE OF ITS JURISDICTION.

This court has jurisdiction to determine the issue of its jurisdiction. *Bell v. Hood*, 327 U.S. 678 (1946)(action against F.B.I. agents for violations of constitutional rights dismissed by district court for want of subject matter jurisdiction on ground action did not arise under Constitution and laws of United States, and reversed by Supreme Court, holding jurisdiction was alleged because it was alleged case arose under the Constitution).

B. "CASE" AND "CONTROVERSY" AND "STANDING," GENERALLY

Article III, Section 2 of the United States Constitution provides as follows:

> The Judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases . . . [or] Controversies . . . .

Of course, as with all things human, humans have taken the words of the Constitution's conferral of judicial power and over the years placed interpretations and restrictions on them. These restrictions have been encapsulated in a series of principles or doctrines the applications of which determine whether an issue is appropriate for judicial resolution and whether the parties raising it are entitled to have it judicially resolved. These constitutional restrictions are intertwined with the amelioration of prudential considerations.

Concerned here is the class of cases contemplated by Article III, Section 2, comprehending " cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority[,]" in which "jurisdiction depends on the character of the cause, whoever may be the parties." *Cohens v. Virginia*, 6 Wheat (19 U.S.) 264, 378 (1821).

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911). The meaning attached to the terms "cases" and "controversies"[1] therefore determines the

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[1] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less

extent of the judicial power as well as the capacity of the federal courts to entertain jurisdiction. According to Chief Justice John Marshall, judicial power is capable of acting only when the subject is submitted in a case, and a case arises only when a party asserts rights "in a form prescribed by law." *Osborn v. United States Bank*, 9 Wheat (22 U.S. 738, 819 (1824). Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a "case", and the term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication. *In re Pacific Ry. Comm.*, 32 F. 241, 255 (C.C. Cal. 1887)(Justice Field). *See also Smith v. Adams*, 130 U.S. 167, 173-74 (1889).

A justiciable controversy thus is distinguished from a difference or dispute of a hypothetical nature, from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real controversy admitting of specific relief, through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Ins. Co.*, 300 U.S. at 240-41. *Cf. Public Service Comm. V. Wycoff Co.*, 344 U.S. 237, 242 (1952).

Chief Justice Earl Warren said that the words "cases" and "controversies" "limit the business of federal courts to

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comprehensive word and includes only suits of a civil nature. *Aetna Life Ins. Co., 300 U.S. v. Haworth*, 300 U.S. 227, 238 (1937).

questions presented in an adversary context, and in a form historically viewed as capable of resolution through the judicial process. Those words define the role assigned to the judiciary in a tripartite allocation of government power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

The touchstone of "case," "controversy," "justiciability," and "standing," one and all, is "adversariness," that is, courts do not take jurisdiction of matters in which there is not a real issue that will be fought out hard between parties who do not truly have an adversary relationship. American law, in this respect, contemplates a pre-Marxian, non-dialectice kind of Leibnizian dialectic: thesis, antithesis, and thesis.

"Standing," that is, who may present a case to a federal court for adjudication, arises as a result of constitutional and prudential limitations on the scope of federal jurisdiction. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citing *Warth v. Selden*, 422 U.S. 490, 498 [1975]). To satisfy the minimum constitutional requirements for standing under the case and controversy requirement of Article III, there must be

> an injury in fact - an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant,

and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); *see also United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996). Often, there is a "necessity that *the* plaintiff who seeks to invoke judicial power stands to profit in some personal interest remains an Art. III requirement." *Simon v Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976)(emphasis added). But this general rule of first party standing is softened by both prudential considerations and duly-enacted statutes, *see infra*, and the "core" or "bedrock requirement" of standing, however, is showing a legally recognized injury. *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997). When there is a legally recognized injury and a statute confers standing, as here, there is a case and controversy that confers jurisdiction on the federal courts.

C. STANDING, SPECIFICALLY

The federal habeas corpus statute itself, in the wisdom of its drafters, is fully sufficient in and of itself to confer standing on petitioners, because the drafters of that statute obviously foresaw lawless government conduct in which a detainee might be prevented from herself or himself seeking habeas relief.

Title 28 U.S.C. 2242 specifically anticipates the instant situation by its use of the words "or by someone acting in his

[a detainee's] behalf[]" to denominate who has standing to make an application for a writ of habeas corpus. The words "by someone acting on his behalf" are unqualified, and there is no support for any contention that there need be any connection whatever between the detainee and whosoever might come to her or his assistance. A statute can overcome a bar to third-party standing, and this statute does just that.

It has been the law of this land for at least 40 years that standing requires only that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete ***adversariness*** which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962)(emphasis added). Standing is a prudential doctrine, *see Warth v. Seldin*, 422 U.S. 490 (1975), that attempts to insure that set-up cases, or cases in which parties collude, do not get decided by federal courts. Ironically, here, respondents seek to thwart the very apparent and abundant "adversariness" they know they will have in this action: but instead they would prefer to have as their adversaries foregin-speaking, perhaps semi- or illiterate detainees who, they say (and not in juest), each have been provided with a half sheet of paper and a pencil to do their best to get access to freedom. Respondents would like to face, as their adversaries, people who can't speak English, wielding half sheets of paper and pencils.

Moreover, there is an exception to the first-party standing requirement when a third party is unlikely to be able to sue, as here.

A person may assert the rights of a third party not before the court, though it is asked that this court bring before this court the detainees so that they may assert their own rights, if there are substantial obstacles to the third party asserting her or his own rights, and if there is reason to believe that the advocate will effectively represent the interests of the third party. *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984). Such is the case here. *See also Barrows v. Jackson*, 346 U.S. 249, 257 (1953)(Court allowed Caucasian third party standing and permitted individual sued for breaching a racially restrictive covenant to assert the rights of African Americans in the community, stating that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972)(third party permitted standing where first party is "denied a forum in which to assert their own rights.")

The respondents' only argument as to standing is that petitioners lack standing because they are third parties. The argument has no merit, because the Supreme Court has treated standing prudentially. The very definition of prudential standing is that Congress by statute can overcome it, as it has done here. "Congress has eliminated any prudential concerns in this case [by enacting a specific statute, 28 U.S.C. 2242, that authorizes standing]." *Dept. of Commerce v. United States House of Representatives*, 119 S.Ct. 765, 772 (1999). "Congress may by statute eliminate prudential standing concerns." Lawrence Tribe, *American Constitutional Law*, 3d ed. 2000, p. 387.

Indeed, the Supreme Court has said that "the actual or threatened injury required by article III [of the Constitution] may exist solely by virtue of statutes creating standing." *Warth*, 422 U.S. at 500 (citations and quotation marks omitted).

That is, prudential standing, as here, may be overcome by statute.

The fatal flaw in respondents' standing argument is that it focuses on whether "next friend" nomenclature of Rule 17(c), F.R. Civ. P., an inapposite concept that addresses capacities in which representatives of minors and incompetents may style their suits. Here, there is no minor or incompetent, and the provisions of Rule 17(c) have no bearing whatever on any issue in this action. Respondents ignore completely that third party standing can be gained by statute, as it is here.

D. "CASE" AND "CONTROVERSY," SPECIFICALLY

There can be no doubt whatever that there is a case and controversy here, and respondents' arguments to the contrary evidence both avoidance of the facts and ignorance of the controlling law.

When the United States government and its policy-making officials, respondents, hold under force of arms and in torturous conditions persons who do not wish to be held, there is a real, concrete case and controversy. Only willful blindness to facts and law, or unfettered arrogance, could result in a contrary view of the world or the law.

What is going on here is neither hypothetical, academic, nor moot, but actually is going on in the real world, with real human beings, albeit persons whom some of us ultimately might

not like when the actual facts of their actions may become known. For anyone, much less government officials charged with upholding the Constitution, to claim there is no case and controversy, which, conveniently, puts their bad actions above the law, makes such persons unfit to hold public office, or worse.

E. RESPONDENTS' OWN BRIEF CONCEDES THAT IF THE DETAINEES ARE SUBJECT TO UNITED STATES SOVEREIGNTY, RESPONDENTS' ARGUMENTS FAIL, AND BECAUSE THE DETAINEES ARE SUBJECT ONLY TO UNITED STATES SOVEREIGNTY, RESPONDENTS' ARGUMENTS FAIL.

Respondents rely solely on *Johnson v. Eisentrager*, 339 U.S. 763 (1950)(written by Justice Jackson, who, immediately before he wrote it had taken a leave from the Supreme Court to be head Nuremburg prosecutor at the War Crimes Tribunals), to support there argument that this court has no jurisdiction of this action. They are wrong, and *Johnson* is both factually abnd legally inapposite for numerous reasons.

>*Johnson* is inapposite because it deals specifically with "prisoners [who] have been convicted of violating laws of war . . . ." *Id.* at 765. Thus, *Johnson's* habeas petitioners already had been given access to American courts, and indeed to appellate review. The detainees here have been refused all access to American courts. Detainees here have been convicted of nothing, much less charged with anything at all: they are held only on the no legal theory that might makes right. But American law is what our courts say it is, and it is not what aphasic American presidents want it to be or claim it to be, or what war mongering secretaries of defense say it must be. In *Johnson*,

indeed, the Court found that "*the doors of our courts ha[d] 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 in the petition why they should not be subject to the usual disabilities of non-resident enemy aliens." *Johnson*, 339 U.S. at 780-81 (emphasis added). Not so here. Here, respondents ask this court to disregard *Johnson* and summarily close its doors on the detainees.

>In *Johnson*, "prisoners were repatriated to Germany [their nation of origin] to serve their sentences." 339 U.S. at 766. Not so here. Here, prisoners have been grabbed up from their nation of origin, Afghanistan, and have not been sentenced, much less charged or tried. Again, *Johnson* is inapposite.

>In *Johnson*, "[t]he case [was] before [the Court] only on issues of law."" *Id.* at 767. Not so here. There are issues fact that underlie jurisdiction. *See infra*. This court cannot decide the issue of jurisdiction without the underlying, disputed issues of jurisdictional facts having been resolved.

>Significantly, as *Johnson* notes, "[m]odern American law [at least back in 1950] ha[d] come a long way since the time when outbreak of war made every enemy national an outlaw . . . ." *Id.* at 768. That was then, but this is now. Now, respondents have taken us back to those barbarian days of yesteryear, the Middle Ages, and actually treat detainees in a way eschewed by *Johnson*, making every detainee "enemy national [and] an outlaw." Petitioners put to this court that the *Johnson* Court would have reached a different conclusion based on the facts of how

respondents in 2002 treat detainees: every enemy national is an outlaw.

>Most importantly, the detainees are "present" in the United States of America, both as a matter of fact and as a matter of law; or else, the facts of the matter are in dispute and must be resolved. *See infra*.

Under *Johnson*, "[m]ere lawful presence in the country creates an implied assurance of safe conduct and gives [one] certain rights . . . ." *Id.* at 770. One such right is the right of access to the courts. Because the detainees ***are lawfully present in the United States*** they have an implied assurance of safe conduct and rights. They are here lawfully because respondents admit they brought them here lawfully. They are here lawfully because Guantanamo Bay Naval Base (GITMO) is, as a matter of both fact and of law, the United States of America. The "Court has been at pains [always] to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771.

Significantly, in *Johnson*, the court held that the prisoners who were *not* entitled to habeas relief "at no relevant time were within any territory over which the United States is sovereign . . . ." *Id.* at 778. Here, as matters of fact and law, the United States *is sovereign* over GITMO. Because of American sovereignty over GITMO *Johnson* has no applicability regarding the jurisdiction of this court.

GITMO is within the United States of America, both as a matter of fact and a matter of law, and thus *Johnson* has no application to this action.

GITMO continues to be foisted on the nation of Cuba by virtue of the still-extant portions of the Agreement Between the United States and Cuba of February 16 & 23, 1903, Article III, and the Treaty Between the United States of America and Cuba of June 4 & 9, 1934, Article III.

Article III of the 1903 Agreement provides that "the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise ***complete jurisdiction and control over and within said areas*** . . . ." (Emphasis added.) That is, the United States exercises complete, unfettered sovereignty over GITMO.

Article III of the 1934 Treaty provides that "[s]o long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty." American sovereignty over GITMO is perpetual.

As the Ninth Circuit recently held, "Congress may enforce its laws beyond the territorial boundaries of the United States. [Citation omitted.] ('Generally there is no constitutional bar to the extraterritorial application of United States penal laws.')." *United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000). "There is therrefore no reason to presume that Congress did, or did not, mean to act extraterritorially. . . . [W]e agree . . . that '[w]hen presented with the task of interpreting jurisdictional statutes . . . courts should simply employ the

standard tools of statutory interpretation . . . .'" *Id.* at 1171. *Accord United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973)(same); *Haitain Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir. 1992)(noting that there is American jurisdiction over the commission of crimes at Guantanamo Bay, Cuba).

There is no intent of American law to "limit jurisdiction on the basis of geography alone." *Corey*, 232 F.3d at 1175.

When, as here, "treaties grant the United States the power and the responsibility to regulate affairs on . . . territories [they control] . . . with substantially greater authority to regulate conduct than the host country[,] . . . [American courts] declin[ing] jurisdiction . . . would upset the jurisdictional balance established by these treaties." *Id.* at 1181. Such is the case here with respect to the exercise of jurisdiction over the detainees at GITMO. Only America, and non one else, has jurisdiction of the detainees.

Here, as in *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951)(finding United States as "de facto sovereign" of the Island of Okinawa), since the United States exercises *de facto* (and *de jure*) sovereignty over GITMO, there is habeas corpus jurisdiction in this action. The Supreme Court has defined the term "foreign country" as "territory subject to the sovereignty of another nation." *United States v. Spelar*, 338 U.S. 217, 219 (1949)(citing *De Lima v. Bidwell*, 182 U.S. 1, 180 (1901)). *See Smith v. United States*, 507 U.S. 197, 203-05 (1993). As a matter of internationally-known fact, it is the United States of America, with its finger stuck in the eye of President Fidel

Castro of Cuba, who exercises complete control, both *de facto* and *de jure*, over the Cuban geography it holds at GITMO, and therefore, under *Cobb*, American exclusive control of that area constitutes American sovereignty of that area. Hence, *Johnson* is inapposite to this action.

There is a perpetual lease for the United States of GITMO unless canceled by mutual agreement of American abandonment.

The United States repeatedly has denied Cuba's requests to return sovereignty of GITMO.

The United States holds all property rights to GITMO.

The United States exercises complete dominion, jurisdiction, and control over GITMO, which is completely reserved for American use only.

The United States has greater, indeed complete, authority over GITMO than does Cuba, who has only a right to receive some $4,000 a year in rent.

>In *Johnson*, "the[] prisoners were actual enemies," *ibid.*, yet here there simply is no evidence the detainees were, or are, actual enemies of the United States of America, just the *ipse dixit* of respondents.

>Indeed, by reason of American sovereignty over a territorial area, persons within that area legally may claim the habeas corpus protection of American courts, and are entitled to it. *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1945). Because the United States exercises sovereignty over GITMO, the detainees are entitled to habeas relief.

>The *raison d' etre* of *Johnson*, that the Second Circuit, whom the Supreme Court rejected -- that the Second Circuit

"gave our Constitution an extraterritorial application to embrace our enemies in arms[,]" *Johnson*, 339 U.S. at 781, is not present here because (1) there is no evidence the detainees are "enemies in arms" and (2) no extraterritorial application is sought for the Constitution, because GITMO is in the United States.

>The Ninth Circuit recognizes a so-called "head quarters" exception to the extraterritorial application of American law. In *Nurse v. United States*, 226 F.3d 996, 1003 (9th Cir. 2000), the court held as follows:

> to the extent that . . . alleged injuries in [another sovereign country]. . . were caused by decisions made by federal officials in the United States, [a] claim survives as a "headquarters claim." A plaintiff states a headquarters claim when she alleges that . . . acts in the United States proximately caused her harm in a foreign country. [Citation omitted.]

See also Leaf v. United States, 588 F.2d 733, 735 (9th Cir. 1978); *Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986); *Sami v. United States*, 617 F.2d 755, 762-63 (D.C. Cir. 1979).

>GITMO is within the United States of America, both as a matter of fact and a matter of law, and thus *Johnson* has no application to this action.

F. NONE OF RESPONDENTS' OTHER POINTS HAS ANY MERIT.

1. As is set forth above, there is no statutory requirement, as respondents incorrectly contend, that petitioners must show a relationship with the detainees. The

statute, 28 U.S.C. 2242, using the express words "by someone acting on his behalf," is to the contrary. *See also Toth v. Quarles*, 350 U.S. 11, 13 n. 3 (1955)(affirming district court grant of habeas relief to one detained in United States in a foreign country by U.S. military though petition was brought by detainee's sibling); *Warren v. Cardell*, 621 F.2d 319, 321 (9th Cir. 1980)(allowing lawyer to file habeas petition on behalf of prisoner who could not sign it because prisoner was under "lock down," where attorney was not retained with prisoner's consent); *Collins v. Traeger*, 27 F. 842, 843 (9th Cir. 1928)(denying objection to third party habeas standing, and stating that habeas petition "may be made and verified by a person authorized to act on behalf of the [prisoner]" when prisoner is "in peril of being removed from the jurisdiction of the court before he could act in person").

2. The contention that this court is without jurisdiction of respondent Bush or Rumsfeld completely ignores both the "minimum contact" jurisdictional test of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), and the facts that both Bush, as president, and Rumsfeld, as secretary of defense, have significantly more than mere "minimum contact" with probably every state of the United States, and especially with California. Indeed, 28 U.S.C. 1391(e)(3) provides that a civil action "in which the defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may . . . be brought . . . in any judicial district in which . . . the plaintiff resides[,]" contemplates jurisdiction in venues in

which the officials do not reside, provided there are such minimum contacts with that venue as would satisfy the minimum contacts test. For either Bush or Rumsfeld seriously to contend that they do not have sufficient minimum contacts with California so as to warrant jurisdiction of them in California would be ludicrous.

G. THERE IS JURISDICTION, OR, ALTERNATIVELY, THERE ARE DISPUTED JURISDICTIONAL FACTS THAT MUST BE SUBJECTED TO DISCOVERY AND DETERMINATION.

Clearly, there is federal court subject matter jurisdiction of this petition.

However, it cannot, as a matter of law, be said there is no jurisdiction because the existence of a number of disputed jurisdictional facts, until resolved, would preclude such a conclusion.

First, whether or not there is access to the courts is a question that cannot be decided as an issue of law without discovery.

Second, it would need to be decided, as a matter of fact, whether GITMO is inside or outside the United States of America. Respondents' characterization that "Cuba retains sovereignty over the leased lands[,]" Resp. at 3:6-7, flies in the face of the provision of the GITMO lease that "the United States shall exercise ***complete jurisdiction and control over and within said areas*** . . . ." *Id.* at 12-13 (emphasis added). It is impossible to understand how a sighted, intelligent person could at lines 6-7 of a page talk about "retains sovereignty" and then just six lines below write the words "complete jurisdiction and control"

with the same property as its object. The juxtaposition is quite amazing and seems to constitute something much more egregious than a Rule 11 violation.

The actual facts of dominion, control, and sovereignty of GITMO either are that it is under complete United States control and sovereignty, or the facts are disputed jurisdictional facts.

In fact and in reality, GITMO *is* a part of the United States, and that is the reason the principle of *Johnson v. Eisentrager* is inapplicable in this action.

H. THIS COURT MUST REFRAIN FROM UNNECESSARILY DECIDING DIFFICULT CONSTITUTIONAL ISSUES WHEN IT NEED NOT, AS HERRE, DO SO.

In order to determine that there is no federal subject matter jurisdiction, this court necessarily would need to decide overarching and serious constitutional issues which it need not, and prudentially, should not reach.

The statute governing jurisdiction should be used to determine the jurisdictional issues.

There would be a serious constitutional question raised were it to be determined that no American court has subject matter jurisdiction of this action.

Therefore, because the statute to be construed provides for jurisdiction, the court should not reach any constitutional issue.

In this regard, in *United States v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001), the Supreme Court construed the habeas corpus statute to allow those facing deportation to have habeas corpus access to the American courts, even though there was strong argument that such jurisdiction was precluded. It did so

to avoid having to decide a much more weighty and serious constitutional issue.

The Court began by stating "the longstanding [*sic*] rule requiring a clear statement of congressional intent to repeal habeas jurisdiction[,]" 121 S.Ct. at 2278, and then cited to *Ex Parte Yerger*, 8 Wall. 85 (1869), for the proposition that "We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law." *Ibid.*

In making its statutory construction, the Court held that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' [citations omitted], we are obligated to construe the statute to avoid such problems." *Id.* at 2279 (citations omitted).

The Court concluded by stating that "[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. Article I, § 9, cl. 2, of the Constitution provides: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' Because of that Clause, some judicial intervention in deportation cases is unquestionably required by the Constitution." *Ibid.* (citations and some internal quotation marks omitted). Such clearly is the case here.

Therefore, some federal court must have jurisdiction of this petition or very serious constitutional crises will have appeared.

The existence of lower federal courts is constitutionally required, at least for some types of claims. Habeas corpus is one of those types of claims because it is a remedy required by the Constitution itself. Were there no federal court to entertain a habeas corpus petition, then Congress would, by not setting up such a court, have violated the Constitution. The earliest expression of this theory is found in the dissent of Justice Joseph Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 328-31 (1816).

Justice Story stated that the full judicial power of the United States must be vested in some federal court, and argued that "[t]he language of the article throughout is manifestly designed to be mandatory upon the legislature. . . . The judicial power of the United States *shall be vested* (not may be vested) . . . . If then, it is the duty of congress to vest the judicial power of the United States, it is the duty of congress to vest the *whole judicial power.*" *Id.* at 328-29 (emphasis in original). Justice Story explained that if Congress could refuse to create lower federal courts, there would be at least some categories of cases that never could be heard in federal court, and this would be unconstitutional, at least with respect to cases for which the Constitution made specific provision, such as habeas corpus. Thus, for this court to find that there is no federal court jurisdiction to hear the instant position would create the legal absurdity Justice Story believed would be a legal impossibility.

A court must, constitutionally, exist to hear the instant case, or else it must be determined, which it constitutionally

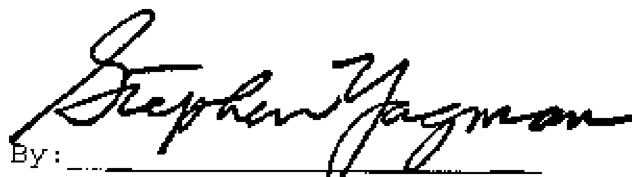
cannot be, that causes required to be heard in federal courts could not be heard in federal courts: an absurdity. Therefore, there must be a federal court who can hear this case. Put another way, if there were no lower federal courts, there could be no federal court review of claims arising under the Constitution pursuant to a writ of habeas corpus, and that would be a legal impossibility, because it would constitute an unconstitutional suspension of the writ of habeas corpus. *St. Cyr, supra.*

Therefore, for cases arising under federal law, especially habeas corpus, jurisdiction must exist in some federal court. *See, e.g.*, Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985). Such is the case here, respondents' arguments to the contrary notwithstanding.

CONCLUSION

This court must find it has subject matter jurisdiction of the petition, that petitioners have standing to seek habeas relief, or it must permit discovery to be undertaken of any non-legal issues that prevent such a determination.

YAGMAN & YAGMAN & REICHMANN



By:____________________
STEPHEN YAGMAN

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4 DECLARATION OF SERVICE

5 I am employed in Los Angeles County, California by a member of the Bar of this Court named at lines 1-3 of page 1 hereof, at
6 whose direction the service declared herein is made, am over the age of 18, am not a party to the within action, and my business
7 address is 723 Ocean Front Walk, Venice, California 90291. On the date set forth on the signature line below, I served the
8 preceding papers on all interested parties whose names and whose addresses are listed below the signature line, by transmitting
9 true, unsigned, copies thereof to interested counsel's facsimile terminal number, and then receiving a facsimile receipt showing
10 receipt thereof by counsel's terminal.
11 I declare the foregoing to be true under the penalty of perjury at Los Angeles, California on the date stamped on the
12 signature line, below.
13 02-08-02
14 SIGNATURE DATE

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